INDEX

CITATIONS

Cases—Continued

Statutes:

Miscellaneous:

In the Supreme Court of the United States

OCTOBER TERM, 1961

No. ——

INTERSTATE COMMERCE COMMISSION, APPELLANT

v.

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF CONNECTICUT

JURISDICTIONAL STATEMENT

OPINIONS BELOW

The opinion of the district court is reported at 199 F. Supp. 635 and is set forth as Appendix A to this Statement. The report of the Interstate Commerce Commission is printed at 313 I.C.C. 23 and is reproduced as Appendix C to this Statement.

JURISDICTION

This action was brought under 28 U.S.C. 1336, 1398, 2284 and 2321–2325 to set aside an order of the Interstate Commerce Commission. The judgment of the three-judge district court (Appendix B, *infra*) was entered on January 8, 1962, and the Interstate Com-

merce Commission filed its notice of appeal in the district court on March 9, 1962.

The jurisdiction of this Court to review the judgment of the district court on direct appeal is conferred by 28 U.S.C. 1253 and 2101(b), and is sustained by *United States* v. *Drum*, 368 U.S. 370.

STATUTES INVOLVED

The National Transportation Policy (49 U.S.C. preceding sections 1, 301, 901 and 1001) and sections 15(7), 15a, 305(c) and 307(d) (49 U.S.C. 15(7), 15a, 905(c) and 907(d), respectively) are set forth in Appendix D.

QUESTIONS PRESENTED

The railroads proposed reduced trailer-on-flatcar (TOFC) rates which are compensatory (i.e., exceed the railroads' out-of-pocket costs in all instances and their fully-distributed costs in many instances), but represent substantial reductions from levels maintained elsewhere to the same levels as the rates of the coastwise water carriers and are applicable only to points served by the coastwise water carriers. The following questions are presented:

1. Whether, under sections 15(7) and 15a(3) of the Interstate Commerce Act and the National Transportation Policy, the Commission may reject as not shown to be just and reasonable the proposed railroad TOFC rates without finding, as the controlling consideration, that the competing coastwise water carriers are the low cost mode of transportation, where the Commission found that the coastwise water carriers' service cannot compete at equal rates with the

railroads' service, that the reduced rail rates are part of a program of rail rate reductions which threaten the continued existence of the coastwise water carrier industry, and that coastwise shipping is important for national defense purposes and is needed by the public as an integral part of the national transportation system.

2. Whether, if the Commission must find as the controlling consideration that the coastwise water carriers are the low cost mode, it must find that the water carriers are the "overall low-cost mode", rather than the low cost mode with respect to the particular movements involved.

3. Whether, if the Commission must make such finding, it is in any event precluded from rejecting a rail rate for a particular movement which yields the railroads' fully-distributed cost which is lower than the fully-distributed cost of the competing water carrier for such movement.

STATEMENT

This case involves the validity of so much of an order of the Interstate Commerce Commission as directed the cancellation of some 66 substantially reduced commodity rates proposed by several railroads for their TOFC or "piggyback" service between points in the East, on the one hand, and Dallas and Ft. Worth, Texas, on the other. The railroads' proposed rates were limited to points served by the only deep-water common carriers now engaged in the Atlantic-Gulf coastwise trade, namely, Sea-Land Service, Inc. (referred to in the Commission's report by its former

name of Pan-Atlantic Steamship Corporation) and Seatrain Lines, Inc.

1. Beginning in 1933, Sea-Land operated as a break-bulk [1] water carrier, except during the World War II years when all vessels employed in the deep-water coastal trade were requisitioned by the United States Government for national defense purposes. In 1957, Sea-Land suspended its Atlantic-Gulf coastwise break-bulk service and converted four vessels into crane-equipped trailerships each capable of holding 226 demountable highway trailers. As a consequence, it became possible for Sea-Land to provide a motor-water-motor service in which freight is moved in demountable trailers from the consignors over highways by certificated motor carriers or by use of Sea-Land's own motor equipment to the ports, whence the trailers are lifted onto Sea-Land ships for movement via water to the destination ports where the process is reversed. The conversion to the more efficient trailership service has reduced Sea-Land's operating costs and has brought about a reduction in the cargo-handling time and the in-port vessel time.

In Seatrain's service, freight is transported to its dock at Edgewater, New Jersey, in railroad cars. The cars and their contents are then lifted onto Seatrain's vessels for the water leg of the journey to Atlantic and Gulf ports served by Seatrain. At destination, the reverse operation occurs and the cars are delivered by rail to the consignee. Thus, it is

[1] Service of the break-bulk type involved the physical unloading of freight from rail car or truck and loading of the cargo into the ships and the reverse of this operation at destination.

a rail-water-rail, non-break-bulk service which offers to the shipper the transportation of his lading in a rail car from consignor to consignee.[2]

Railroad TOFC service is a motor-rail-motor operation in which the shipment leaves the consignor in a motor carrier trailer and arrives at the door of the consignee in the same trailer, the laden trailer having been transported in the line haul on a railroad flatcar. While this type of operation has been engaged in sporadically since 1926, its principal growth has occurred in recent years, and the rail TOFC service between points in the southwest and points in the east was inaugurated in the summer of 1956.

Traditionally, water rates, including water-rail and water-motor rates, have been maintained at levels differentially lower than the corresponding all-rail rates, principally because of disadvantages in the water service due to perils of the sea, slower transit time, and infrequency of sailings. When Sea-Land inaugurated its new trailership service in 1957, it published rates which, in general, were 5 to 7½ percent lower than the corresponding all-rail boxcar rates, but were less than the differentials which had existed by reason of the rates formerly maintained for the break-bulk service.

---

[2] Seatrain's operations have previously been before this Court in *United States* v. *Pennsylvania R. Co.*, 323 U.S. 612.

[3] See *Class Rate Investigation, 1939*, 286 I.C.C. 5 (1952), the last major proceeding in which the rates of Atlantic-Gulf coastwise water carriers were considered, where the Commission prescribed reasonable maximum class rates on ocean-rail traffic designed to preserve the then-existing differentials of the ocean-rail rates under the all-rail rates.

2. By schedules filed to become effective on November 14, 1957, and later, the railroads proposed to establish the reduced TOFC rates at issue. Since the establishment of the reduced TOFC rates would leave higher rates in effect to and from intermediate points involving shorter hauls in violation of the long and short haul provisions of section 4(1) of the Act, 49 U.S.C. 4(1),[4] the railroads also applied to the Commission for the relief from those provisions, which section 4(1) permits the Commission to authorize "in special cases." The proposed rates and the fourth section application were opposed by the Secretary of Agriculture, the Houston Port Bureau, the Port of New York Authority, the City of Providence, the New Orleans Traffic and Transportation Bureau, Sea-Land, Seatrain, and a motor carrier association. The rates were suspended and placed under investigation in the Commission's I. & S. Docket No. 6834, *Piggy-Back Rates—Between East and Texas*, which docket also embraced the fourth section application as well as certain effective Sea-Land and Seatrain rates between the same points the lawfulness of which are not at issue in this litigation. On December 19, 1960, the Commission issued its

[4] For example, the normal TOFC rate on candy from Boston to Dallas is 290 cents per 100 pounds and the distance over a direct rail route is 1,965 miles, while the normal TOFC rate from Boston to Bald Knob, Arkansas, a distance of 1,543 miles, is 236 cents per 100 pounds. Plaintiffs propose to reduce the rate from Boston to Dallas to 214 cents per 100 pounds while maintaining the rate of 236 cents per 100 pounds for the shorter haul to the Arkansas destination.

report (313 I.C.C. 23, App. C, *infra*, pp. 53–127)[5] and accompanying order.

The Commission found that the proposed TOFC rates equal or exceed out-of-pocket costs for hauls of average circuity for all listed movements by TTX cars and for all but six movements by railroad-owned cars, and equal or exceed fully-distributed costs for 43 movements by TTX cars and for 14 movements by railroad-owned cars (App. C., p. 74).[6] Consequently, with the exception of the six rates returning less than out-of-pocket costs,[7] the proposed TOFC rates are compensatory (*id.* at 74, 87). Similarly, the corresponding Sea-Land rates, with one exception, were found to be compensatory

---

[5] This is a consolidated report embracing some 43 docket proceedings which were, in turn, consolidated into four dockets for hearing. The first of these consolidated dockets, I. & S. No. M-10415, *Commodities—Pan-Atlantic Steamship Corporation*, is the title under which the consolidated report is issued. The others are I. & S. No. 6834, *Piggy-Back Rates—Between East and Texas;* I. & S. No. 6906, *Commodities via Pan-Atlantic Between Texas, Louisiana and Florida;* and I. & S. No. M-11375, *Tires, Chemicals and Paints via Pan-Atlantic.* Under consideration in the three named dockets other than I. & S. No. 6834 were numerous rates of Sea-Land not at issue here. It was agreed that the evidence in each of the first two named dockets could be used in both to the extent relevant, and would be incorporated by reference in the last two named dockets. An examiner's report was filed in each of the four named dockets, and the Commission's Division 3 issued a report in I. & S. No. M-10415 (309 I.C.C. 587).

[6] TTX cars are flatcars leased by the railroads which hold two trailers, while railroad-owned cars have a capacity of one trailer per car (*id.* at 73). No finding could be made as to the relative percentages of the TOFC traffic which would move in either type of car (*id.* at 74, 90).

[7] These six rates were withdrawn by the railroads and are not at issue.

(*id.* at 72–73, 87), as were the Seatrain rates (*id.* at 77, 87).

With respect to the relative costs of the competing modes, the Commission found that the Sea-Land costs, both out-of-pocket and fully-distributed, are below the TOFC costs for all movements of comparable weight as computed for railroad-owned flatcars, and are below the TOFC costs for all except two of the 66 movements for TTX cars (*id.* at 73, 90). However, the Commission made it quite clear that it was not resting its decision in these proceedings on relative costs. Thus, after concluding that it couldn't determine the low cost mode because of certain variables which affect costs and the absence of rail costs as to many of the rates,[8] the Commission said: "We must recognize, also, that cost is only one of the elements which may appropriately be considered in passing upon the lawfulness of rates. In the exceptional circumstances here presented, other considerations, herein discussed, appear to us determinative of the issues." (*id.* at 91).

The Commission found that uncertainty of ocean transport, infrequency of sailings, and longer transit time than by TOFC service are factors present in both Sea-Land and Seatrain service (*id.* at 79–81); that there is no indication that Sea-Land has moved any traffic at rates as high as competing all-rail boxcar

[8] The absence of rail costs as to many of these rates refers to the rail costs for boxcar service, which was the competing rail service with respect to the numerous Sea-Land rates at issue in the other dockets embraced in the consolidated report which are not involved in this litigation.

or TOFC rates (*id.* at 73, 38) and it is conceded that Seatrain offers a lower quality service than TOFC (*id.* at 78); that most of the shippers prefer rail service to Sea-Land service except at lower rates for the latter (*id.* at 88); and that, in order to attract traffic, Sea-Land and Seatrain must establish rates somewhat below those of the rail carriers (*ibid*). It also found (*id.* at 89) that all of the Sea-Land traffic is competitive with the railroads; that Sea-Land must recover its fully-distributed costs on its overall operations if it is to continue in operation; and that, if the differentially lower rates which Sea-Land must maintain to attract traffic in competition with the railroads were forced by such competition to be reduced to a point where they failed to recover operating costs plus a reasonable return, Sea-Land's operations would become unprofitable and their continuance threatened.

The Commission noted that while section 15a(3), 49 U.S.C. 15a(3), prohibits the holding of the rates of a carrier to a particular level to protect the traffic of another mode of transportation, that prohibition is qualified by the words "giving due consideration to the objectives of the national transportation policy declared in the Act." And it pointed out that "It is the declared national transportation policy, among other things, to provide for fair and impartial regulation of all modes of transportation subject to the Interstate Commerce Act, so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers, all to the

end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense." (*id.* at 91–92). It expressly found (*id.* at 92) that "The reduced rates of the railroads here under consideration are an initial step in an overall program of rate reductions that can fairly be said to threaten the continued operations, and thus the continued existence, of the coastwise water-carrier industry generally." Next, the Commission summarized the facts showing the decline in the Atlantic-Gulf coastwise trade, both in the number of companies engaged in the trade and the tonnage carried (*id.* at 92–93). Quoting representative statements, the Commission noted that the importance of coastwise shipping for national defense purposes[9] has been repeatedly emphasized from various governmental sources and that it is important for general public use as an integral part of the national transportation system (*id.* at 93–94). In addition, the Commission referred to the provisions of sections 305(c) and 307(d) of the Act, 49 U.S.C. 905(c) and 907(d), as indicative of a Congressional intent that, where necessary to permit an essential, efficiently-operated water carrier to participate in the economical movement of traffic, the water carrier service should be accorded some advantage in the form of lower rates.

---

[9] For a recent example, see *Ocean Shipping to Support the Defenses of the United States*, Department of the Navy (1961), reproduced at 107 Cong. Rec. 7299–7302 (1961).

The Commission concluded (*id.* at 96): "In the circumstances presented here, we are of the opinion that the objectives of the national transportation policy require the establishment and maintenance of a differential relationship between the rates under investigation on sea-land and Seatrain service, on the one hand, and the rates of the rail carriers, on the other, which will allow these water carriers operating in the coastwise trade to maintain rates that will enable them to continue efficient and economical coastwise service." It then stated that a 10 percent differential sought by Sea-Land appeared to be excessive but that, in its judgment, the TOFC rates at issue should be maintained on a level no lower than 6 percent above Sea-Land's rates so long as the latter are not increased above their present levels (*id.* at 96–97). Accordingly, the Commission found the proposed reduced TOFC rates not shown to be just and reasonable, directed their cancellation without prejudice to the filing of new schedules in conformity with its conclusions, and denied the fourth section application for relief to establish the rates.

3. On February 2, 1961, the railroads filed suit in the district court to set aside the Commission's order to the extent that it required the cancellation of the TOFC rates. Sea-Land and Seatrain intervened and appeared in defense of the order. On November 15, 1961, the court rendered its opinion (App. A, *infra*, pp. 25–50), concluding that the order requiring cancellation of the TOFC rates should be set aside, and the Commission enjoined from cancelling TOFC rates

which return at least fully-distributed costs of carriage. Its judgment (App. B, *infra*, pp. 51–52) was entered on January 8, 1962.

The court held that the requirement of a rate differential to protect the water carriers is plainly holding up railroad rates to protect another mode in violation of section 15a(3), and that the evidence and findings do not support the Commission's position that the National Transportation Policy compels that result (App. A, pp. 31–32). At the heart of the court's decision is its construction of section 15a(3) as constituting a flat prohibition against differentials, except where a competing mode would be destroyed by rates set so low as also to harm the proponent or so low as to deprive the competing mode of its inherent advantage of lower costs [10] (*id.* at 37–38). Consequently, it held that the Commission lacks power to reject compensatory rates to prevent the destruction of a competing mode unless the threatened mode is also the low cost mode (*id.* at 34–35, 37). In addition, the court held that, in order to be entitled to protection, the competing mode must be the "overall low cost mode," rather than the low cost mode with respect to the particular movements involved (*id.* at 42–43, 46); that, in any event, the Commission is prohibited from rejecting a rail rate for a particular movement if it yields the railroad's fully-distributed cost which is lower than the water carrier's fully-distributed cost (*id.* at 47); and that, despite the court's rejection of the Commis-

[10] The court made it clear that determination of the low cost mode is to be made on the basis of fully-distributed costs (*id.* at 32–33).

sion's basis of decision, the Commission may find unlawful such TOFC rates as fail to yield fully-distributed cost (*id.* at 46).

THE QUESTIONS ARE SUBSTANTIAL

This case presents questions of fundamental significance respecting the role of the Commission and the statutory standards which properly govern its decisions in the increasingly important area of intermodal competitive ratemaking. Placing principal, if not exclusive, emphasis on its interpretation of section 15a(3), added to the Interstate Commerce Act in 1958, the district court has elevated relative costs to a pre-eminent position. The necessary effect of the court's decision is to substantially impair the viability of important provisions of the National Transportation Policy and to relegate the Commission to the role of a mere computer of costs. We submit that this result was never contemplated by Congress and is inconsistent with the express language of the Interstate Commerce Act, including section 15a(3).

1. Section 15a(3) was the culmination of several years of reports and hearings on the proper purpose and scope of the regulation of intermodal rate competition. In 1955, the President's Advisory Committee on Transport Policy and Organization, under the chairmanship of the Secretary of Commerce, issued a report, sounding the keynote that "Increased reliance on competitive forces in rate making con-

stitutes the corner-stone of a modernized regulatory program," recommending a revision in the National Transportation Policy, and specifically recommending the elimination of the phrase "unfair or destructive competitive practices."[11] The Committee proposed the following new ratemaking rule:[12]

> In determining whether a rate, fare, or charge, or classification, regulation, or practice to be applied in connection therewith, results in a charge which is less than a reasonable minimum charge, as used in this Act, the Commission shall not consider the effect of such charge on the traffic of any other mode of transportation; or the relation of such charge to the charge of any other mode of transportation; or whether such charge is lower than necessary to meet the competition of any other mode of transportation. * * *

This proposal, containing what became known as the "three shall nots," was supported by the railroads and opposed by the water and motor carriers,

---

[11] *Revision of Federal Transportation Policy*, Report by Presidential Advisory Committee on Transport Policy and Organization (1955), reprinted in *Transport Policy and Organization*, Hearings before a Subcommittee of the House Committee on Interstate and Foreign Commerce, 84th Cong., 1st Sess. (1955).

[12] Proposed section 15a(1) in H.R. 6141, 84th Cong., 2d Sess. (1956), reprinted in *Transportation Policy*, Hearings before a Subcommittee of the House Committee on Interstate and Foreign Commerce, 84th Cong., 2d Sess., Part 1, at 5 (1956).

the Commission, and independent experts. It eventually died in committee;[13] and, in its place, Congress passed the present section 15a(3), reading as follows:

> In a proceeding involving competition between carriers of different modes of transportation subject to this Act, the Commission, in determining whether a rate is lower than a reasonable minimum rate, shall consider the facts and circumstances attending the movement of the traffic by the carrier or carriers to which the rate is applicable. Rates of a carrier shall not be held up to a particular level to protect the traffic of any other mode of transportation, giving due consideration to the objectives of the national transportation policy declared in this Act.

In its report on the Transportation Act of 1958, which included section 15a(3) as finally adopted, the Senate Committee on Interstate and Foreign Commerce stated that:

> [The section] is designed to encourage competition in transportation by allowing each form of tranportation subject to the Interstate Commerce Act full opportunity to make rates reflecting the inherent advantages each has to

[13] By letter dated April 22, 1958, the Secretary of Commerce, withdrew his support for the "three shall nots," and unsuccessfully urged antitrust standards for determining the lawfulness of competitive rate reductions. *Problems of Railroads*, Hearings before the Subcommittee on Surface Transportation of the House Committee on Interstate and Foreign Commerce, 85th Cong., 2d Sess., Part 4, at 2353 (1958).

> offer, with such ratemaking being regulated by the Interstate Commerce Commission, however, to prevent "unfair or destructive competitive practices" as contemplated by the declaration of national transportation policy. Under the committee amendment the principal emphasis, but not the exclusive emphasis, in a competitive ratemaking proceeding involving different modes of transportation will be on the conditions surrounding the movement of the traffic by the mode to which the rate applies.[14]

In reporting the bill, the House Committee commented to substantially the same effect, specifically enjoining the Commission to give "due consideration to the objectives of the national transportation policy declared in the Interstate Commerce Act."[15]

2. We submit that the district court erred in holding that the Commission lacks power to reject compensatory rates to prevent the destruction of a competing mode of transportation unless the threatened mode is also the low cost mode. Such a result is inconsistent with the objectives declared in the National Transportation Policy, which is "the yardstick by which the correctness of the Commission's actions will be measured" (*Schaffer Transportation Co.* v. *United States*, 355 U.S. 83, 88) and "the Commission's guide to the public interest" (*McLean Trucking Co.* v. *United States*, 321 U.S. 67, 82), and may not properly be inferred from the language or legislative history of section 15a(3).

---

[14] S. Rep. No. 1647, 85th Cong., 2d Sess. 3–4 (1958).

[15] H.R. Rep. No. 1922, 85th Cong., 2d Sess. 13–15 (1958).

On numerous occasions prior to the enactment of section 15a(3), the Commission has rejected proposals for reduced but compensatory rates when convinced that the challenged rates would lead to the destruction of competing modes.[16] In fact, in at least two cases, courts have set aside orders of the Commission approving rate reductions for failure of the Commission to consider whether the rates would lead to the extinction of competing modes. See *Pacific Inland Tariff Bureau* v. *United States*, 129 F. Supp. 472 (D. Ore. 1955), *motion for new trial denied*, 134 F. Supp. 210 (1955); *Cantlay & Tanzola, Inc.* v. *United States*, 115 F. Supp. 72 (S.D. Cal. 1953).[17] And in *Scandrett* v. *United States*, 32 F. Supp. 995, 997–998 (D. Ore. 1940); *aff'd*, 312 U.S. 661, before the enactment of the National Transportation Policy, the court held that the Commission had the power to fix minimum rates for the railroads so that they could

[16] *Pig Iron from Rockwood, Tenn., to Chicago and Joliet*, 298 I.C.C. 430 (1956); *Petroleum Products in California and Oregon*, 284 I.C.C. 287 (1952); *Petroleum Products in Illinois Territory*, 280 I.C.C. 681 (1951); *Pig Lead from Brownsville, Tex., to Chicago and St. Louis*, 280 I.C.C. 585 (1951); *Petroleum Products from Los Angeles to Arizona and New Mexico*, 280 I.C.C. 509 (1951).

[17] *Cf., Columbia Transportation Co.* v. *United States*, 167 F. Supp. 5 (E.D. Mich. 1958) and *National Water Carriers Assn.* v. *United States*, 120 F. Supp. 719 (S.D.N.Y. 1954), sustaining orders of the Commission approving rail rate reductions on the ground that the traffic would continue to be available to both the railroads and the water carriers with no danger of destroying the latter.

not put an end to the existence of water competition."[18]

Moreover, this Court has pointed out that with the evolution of other forms of carriage than transportation by rail, the Commission was charged with seeing that the rates and services of each are coordinated in accordance with the National Transportation Policy which was designed to eliminate destructive competition among the different forms of carriage, *Eastern-Central Assn.* v. *United States*, 321 U.S. 194, 205–206, and that whether factors of cost or competition control is a choice for the Commission to make in its informed judgment, *id.* at 210. The decisions of this Court and of the Commission have repeatedly rejected the suggestion that costs must control in ratemaking. *Alabama G.S. R. Co.* v. *United States*, 340 U.S. 216, 223, n. 4, and cases cited there. And in *New York* v. *United States*, 331 U.S. 284, 346, the Court said:

> These cases, to be sure, recognize the power of the Commission so to fix minimum rates as to keep in competitive balance the various

---

[18] H.R. Rep. No. 456, 66th Cong., 1st Sess. 19 (1919), accompanying the Transportation Act of 1920 which conferred the minimum rate power on the Commission, was quoted by the court as follows:

"[The minimum rate power] would also prevent a rail carrier from destroying water competition between competitive points by prohibiting such carrier from so reducing its rates as to destroy its water competitor. Circumstances have been cited where the rail carrier destroyed its water competitor by such a reduction of rates as to make it impossible for the water carrier to survive. When once competition was thus driven off the rail rates would be restored or would rise to even higher levels. * * *"

> types of carriers and to prevent ruinous rate wars between them. That plainly is one of the objectives of the Act, and one of the reasons why the Commission was granted the power to fix minimum rates by the Transportation Act of 1920. * * *

The decision of the district court would severely limit the scope of the phrase "destructive competitive practices" in the National Transportation Policy and virtually read out of the Act the express command of the Policy that the Commission "foster sound economic conditions in transportation and among the several carriers" and administer the Act "to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense." But the obligation of the Commission to give due consideration to the objectives of that Policy was expressly reaffirmed in section 15a(3).[19] Clearly, the court's deci-

---

[19] Nothing in the 1958 amendment or its legislative history wipes out those provisions of sections 305 and 307 which the Commission found "indicative of the Congressional intent" to preserve a place in the national transportation system for efficiently operated water carriers.

A sharply differing opinion than that of the district court as to the proper interpretation of section 15a(3) is illustrated by *Decline of Coastwise and Intercoastal Shipping Industry*, Report of the Merchant Marine and Fisheries Subcommittee of the Senate Committee on Interstate and Foreign Commerce, 86th Cong., 2d Sess. (Govt. Print. 1960), which emphasizes the objective "sought above all else to foster a national transportation system by water, highway, and rail" (p. 21); recognizes that "'destructive competition' can have no meaningful

sion raises a substantial question having far-reaching consequences for the transportation industry.

3. Other aspects of the district court's decision introduce novel concepts having serious consequences for future administration of the Interstate Commerce Act in the area of intermodal competitive ratemaking. Thus, the court held that, in order to be entitled to protection, the competing mode must be the "overall low-cost mode" or "in general the low-cost mode," rather than the low cost mode with respect to the particular movements involved. This would appear to mean that there must be cost data respecting the overall operations of the competing modes from which the Commission can determine that one or the other of the competing modes is the lower cost mode in terms of its overall operations. Heretofor, in competitive ratemaking proceedings, only cost data respecting the particular movements for which rates are proposed have been required or presented, since only those rates and movements are at issue. Representative cost data on this limited basis are difficult enough to adduce. It will be readily appreciated that to make the comprehensive study and determination required by the court would impose an insuperable burden on the parties and the Commission.

---

definition unless its necessary component—'meet the competition'—takes into account the need for differentially lower rates by water" (p. 45); and states that "The express incorporation of the national transportation policy in the rule of ratemaking is a matter of substance, requiring the Commission to examine a proposed competitive rate for destructive effect as well as destructive intent to the end that a balanced and healthy transportation system by all modes is to be preserved" (p. 50).

The court has also held that, even should the Commission find the water carriers to be the low cost mode in general, the Commission may not reject any rate for a particular movement which yields the railroad's fully-distributed cost which is lower than the competing water carrier's fully-distributed cost for that movement. This would seem to mean that the Commission may not halt a rate war until the rates for particular movements have come down to the fully-distributed costs of the low cost mode. It ignores the fact that on many high value commodities rates are, and, whenever conditions permit, should remain at a level substantially above fully-distributed costs.[20] See, *e.g.*, *Tobacco from North Carolina to Central Territory*, 309 I.C.C. 347 (1960); *Alcoholic Liquors in Official Territory*, 283 I.C.C. 219 (1951). This "value of service" concept gives recognition to the obvious fact that commodities differ greatly in their value, hence have differing abilities to absorb the costs of transportation. As an essential element of the existing rate structure, it insures that adequate transportation is available to move the low value commodities (many of which will only move at rates slightly above out-of-pocket costs) as well as those of higher value. At a number of places in its opinion, the court has apparently confused costs and revenue needs, and has erroneously assumed that value of service considerations are subsumed in fully-distrib-

[20] The commodities involved here are relatively high value manufactured or processed goods as to which there was no contention that the rates of the competing water carriers are too high.

uted costs (App. A, *infra*. pp. 40–41).[21] This may account for the holding here.

Finally, we note that despite its rejection of the Commission's basis for decision, the court would apparently permit the rejection of the TOFC rates which do not yield fully-distributed costs. We are frankly puzzled concerning the basis for this holding, unless the court does not accept the Commission's view that rates above out-of-pocket costs but below fully-distributed costs are not necessarily to be rejected as non-compensatory.

4. The importance of the questions raised by the district court's decision is underscored by the fact that it has been recently cited as of "controlling importance" by a three-judge court in the Eastern District of Missouri in *Missouri Pacific Railroad Co., et al.* v. *United States, et al.*, Civil Action No. 61 C 380(1), decided March 19, 1962, judgment entered April 20, 1962, setting aside a Commission order rejecting reduced rail rates in Docket No. 33334, *Exceptions Ratings on Agricultural Road Making and Other Articles*, 315 I.C.C. 9 (1961). In view of the increasing volume of these intermodal competitive ratemaking cases involving every mode of surface

[21] While the court discussed, and commented on adversely, the Commission's methods of determining costs (App. A, *infra*, pp. 40), this was a matter neither challenged before the Commission or the court nor briefed. To the extent that this discussion is not dictum, we will also contend that it relates to matters committed to Commission judgment in the first instance, as this Court has held. See *Federal Power Commission* v. *Hope Natural Gas Co.*, 320 U.S. 591, 602, 615; *Illinois Commerce Commission* v. *United States*, 292 U.S. 474, 481.

transportation, we submit that prompt resolution of the questions presented by this appeal is essential.

CONCLUSION

For the reasons stated, we believe that the questions presented by this appeal are substantial and are of such public importance as to require plenary consideration, with briefs and oral argument, for their resolution.

Respectfully submitted.

ROBERT W. GINNANE,
General Counsel.
B. FRANKLIN TAYLOR, JR.,
Associate General Counsel,
Interstate Commerce Commission,
Washington 25, D.C.

MAY 1962.

APPENDIX A

United States District Court, District of Connecticut

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY, ET AL., PLAINTIFFS

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, DEFENDANTS

SEA-LAND SERVICE, INC., AND SEATRAIN LINES, INC., DEFENDANTS-INTERVENORS

Civil Action No. 8679

Before: HINCKS, Circuit Judge, and ANDERSON and TIMBERS, District Judges.

Action by plaintiffs-railroads, brought under 49 U.S.C. § 17(9); 28 U.S.C. §§ 1336, 1398, 2284 and 2321–2325; and 5 U.S.C. § 1009, to enjoin, annul and set aside an order of the Interstate Commerce Commission, 313 I.C.C. 23, directing the cancellation of plaintiffs' proposed reduced trailer-on-flat-car (TOFC) rates on various commodities.

HINCKS, Circuit Judge:

This is an action brought by several railroads to enjoin an order of the Interstate Commerce Commission, entered pursuant to a report[1] published in 313 I.C.C. 23, directing them to cancel substantial rate

[1] Reference in this opinion to the report will employ the pagination of 313 I.C.C., thus: "R. 1(2, 3, etc.)."

reductions for 66 listed movements of their trailer-on-flat-car (TOFC) service between points in the East and Texas. Two water carriers, Sea-Land Service, Inc. (hereinafter referred to as Sea-Land), and Seatrain Lines, Inc. (hereinafter Seatrain), protested the proposed rates and appeared herein to defend the order below. The United States and the Interstate Commerce Mission also appeared herein and defended the order. They will be referred to collectively as "the government."

Sea-Land, known in the proceedings before the Commission by its former name Pan-Atlantic Steamship Corporation, in 1957 had suspended its domestic break-bulk freight service, theretofore operated between eastern ports and Southern Atlantic and Gulf ports. It substituted four "tariler-ships," each of a capacity to carry 226 standard, demountable, truck trailer-bodies, and each equipped with cranes capable of lifting the loaded trailers from their chassis on the pier, stowing them aboard, unopened, into cooperating slots and, at the ports of destination, lifting them onto trailer-chassis on the pier. By this improved highway-water-highway "fishy-back" service, Sea-Land offered a door-to-door service to all shippers and consignees accessible by highway in containers locked or unopened between the point of origin and destination. The conversion from break-bulk service to the "fishy-back" service just described enabled Sea-Land to improve the quality of its service and reduce operating costs at rates which, prior to 1957, were five to ten percent below the rail boxcar rates.

Seatrain offers rail-water-rail service whereby loaded railroad cars are taken aboard its three steamships at Edgewater, New Jersey and after carriage by sea to a destination in a southern coast or a Gulf port are then carried by a railroad for delivery to the

consignee. Seatrain contemplates a modification of this service, a so-called "seamobile service," whereby the freight will be carried in special containers which may be readily transferred from highway trailers or railcars to and from its seagoing vessels. Like railroad boxcar service, the present Seatrain service permits carriage from shipper to consignee without breaking bulk only when shipper and consignee are located on railroad sidings.

To compete with these services and especially that of Sea-Land which is available to shippers and consignees without rail access, the railroads considerably extended their "piggy-back," highway-rail-highway, service, whereby trailer-bodies, without detachment from their chassis, are hauled onto and tied down upon railroad flatcars, one or two to each flatcar, and at the rail destination are hauled by tractors to the consignees' doors. Prior to 1957 the rates set for this TOFC service were generally on a parity with those in force for regulated motor-carrier service and somewhat higher than the rail boxcar rates. But to make their competition with Sea-Land's fishy-back service more successful, the railroads in 1957 filed rate schedules for their TOFC service which were substantially on a parity with Sea-Land and Seatrain rates, R. 33, and motor common carrier rates, R. 45. However, these rate schedules, since inaugurated as an experiment, were limited to 66 commodity movements from particular eastern points to Forth Worth and Dallas and return.

On petitions of Sea-Land, Seatrain, a motor-carrier association, the Secretary of Agriculture, and several municipal authorities, the Commission placed all the TOFC rates in this initial, or pilot, schedule under suspension and investigation under I. & S. Docket No. 6834—"Piggy-Back Rates—Between East and

Texas," which also covered the lawfulness of Sea-Land rates between the same points and certain Seatrain rates. This controversy, together with three others involving the lawfulness of numerous other Sea-Land rates, each under separate docket numbers, I. & S. Docket No. M-10415, I. & S. Docket No. 6906, and I. & S. Docket No. M-11375, came on for hearing before Examiner Morgan who filed a separate report on each. On exceptions by the parties, No. M-10415 was heard by Division 3 of the Commission and on further exceptions by the railroads to the Division 3 report all four docket numbers were consolidated for hearing and dealt with in a consolidated report [2] by the entire Commission.

The Commission held [3] that the entire schedule of TOFC rates was unlawful and, in the order under attack herein, directed that the rates, which had theretofore been under suspension, be canceled. This cancellation date, however, was ordered suspended, thus leaving the rates in continuing suspension. It was to set aside the cancellation order as to the TOFC schedule that the railroads brought this action. Except for a few specific rates, the Sea-Land and Seatrain rates were found lawful and to this holding no exception had been taken to the Division 3 report.

---

[2] This report embraced 43 docket proceedings.

[3] Its report was adhered to by five Commissioners. Commissioner Hutchinson concurred on the ground that the proposed schedule constituted a destructive competitive practice. Commissioner Freas, in a dissenting report in which Chairman Winchell and Commissioner Webb joined, dissented on the ground that the Interstate Commerce Act as amended neither required nor permitted "b[illegible]rotection for the water carriers." Commissioner McPherson, concurring in part, said: "I would approve all the rates which are compensatory but on this record I would not impose any differential." Only ten Commissioners were then in Office.

The Commission's essential findings as enunciated by five of the Commissioners in its report were as follows:

1. The proposed TOFC rates would produce revenues exceeding out-of-pocket costs (see Appendix A *infra*) for all of the proposed movements by TTX flatcars [4] and for all but six of 66 of the listed movements by railroad-owned cars,[5] and exceeding the railroads' fully-distributed costs (see Appendix A) for 43 of the 66 movements by TTX cars and 14 movements by railroad-owned cars. R. 36. Consequently, except for the six rates returning less than *out-of-pocket* costs [6] the TOFC rates were found to be compensatory.[7] The corresponding Sea-Land rates, with one exception, were similarly found to be compensatory, as were the Seatrain rates.

2. As to the 66 movements in issue here, Sea-Land costs, both on an out-of-pocket and a fully-distributed basis, were lower than TOFC costs except for two (out of the 66) movements accomplished by TTX cars. However, railroad boxcar costs on some of this traffic were lower than Sea-Land costs; on other portions of the traffic, Sea-Land costs were lower. On the record before it the Commission said it "can not determine * * * where the inherent ad-

---

[4] Flatcars on lease by the railroads capable of carrying two trailers.

[5] The conventional railroad-owned cars are generally capable of carrying only one trailer. As the Commission observed, the choice between 1- or 2-trailer cars "would rest entirely with the railroads."

[6] These six rates the railroads withdrew and they are not in issue in this litigation.

[7] The report makes it plain that the Commission considered that rates yielding in excess of out-of-pocket costs were "compensatory."

vantages may lie as to any of the rates in issue."[8] R. 46.

3. In quality of service, the several modes rated in the following order: TOFC, all-rail boxcar, sea-land and Seatrain. However, "the most important, and usually the determinative factor to the shippers as a whole is the measure of the rates."[9] R. 29.

4. All Sea-Land traffic is competitive with the railroads. But only a fraction of railroad traffic is competitive with Sea-Land. R. 45.

5. The railroads intend, if the proposed TOFC rates attracted profitable traffic, to extend the reductions in TOFC rates to many other movements than the 66 immediately involved herein. R. 47.

6. Sea-Land must recover fully-distributed costs to remain in business. R. 38.

On conclusions thought to follow from these findings, the Commission ordered the proposed TOFC rates cancelled, holding that, "the rail TOFC rates on the commodities from and to the points concerned in I. & S. No. 6834 should be maintained on a level no lower than 6 percent above * * * sea-land rates, so long as the latter are not increased above their present levels." And its order was expressly stated to be "without prejudice to the filing of new schedules *in conformity with the conclusions herein.*" R. 50. [Emphasis supplied.]

---

[8] The Commission pointed out that both the TOFC and the Sea-Land service were subject to certain variables not measurable in the record before it.

[9] The Commission, after describing the various competing services, concluded that "the preponderance of the testimony on these records is to the effect that most of the shippers prefer rail service to sea-land except at lower rates for the latter." This, obviously, indicates recognition of some quality-of-service superiority in dependability and speed for overland as against water transport. R. 44. See also R. 38–40.

We hold that, at least on this record, the requirement of a rate differential to protect the water carriers violated the 1958 Amendment to the Interstate Commerce Act, now appearing as 49 U.S.C. § 15a(3), which reads as follows:

> "In a proceeding involving competition between carriers of different modes of transportation subject to this Act, the Commission, in determining whether a rate is lower than a reasonable minimum rate, shall consider the facts and circumstances attending the movement of the traffic by the carrier or carriers to which the rate is applicable. Rates of a carrier shall not be held up to a particular level to protect the traffic of any other mode of transportation, giving due consideration to the objectives of the national transportation policy declared in this Act."

In disapproving the proposed schedule of the railroads the Commission, contrary to the specific prohibition of the 1958 amendment, is plainly holding up railroad rates "to protect the traffic" of another mode. It argues, however, that the national transportation policy (hereinafter sometimes referred to as NTP),[10] to which it is commanded to give "due

---

[10] The Congressional declaration of the National Transportation Policy was introduced into the Interstate Commerce Act by the Transportation Act of 1940, 54 Stat. 899, and now appears in the United States Code (1958) preceding §§ 1, 301, 901, and 1001 of Title 49:

"It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable

consideration" by the same provision, compels this result. The evidence and findings do not support this argument.

The first policy-factor mentioned in the NTP declaration is to "recognize and preserve the inherent advantages of each [mode of transportation]." By "the inherent advantages" was meant the ability of a mode of transportation over the long run to provide a transportation service more acceptable to its shippers, by reason of quality or price, than that offered by a competing mode. That the calculation was to be long-run must be emphasized. The shorter-run "out-of-pocket" costs of one mode (e.g., railroads) may be lower than the longer-run "fully-distributed," or even the shorter-run costs of competing modes (e.g., water carriers) whose long-run costs are lower. When they are, rates set by reference to out-of-pocket costs may favor what in the long run is the less efficient, higher-cost mode. Thus the "inherent advantages" of lower cost (or better service, which is discounted for price) refers to the long-run, or fully-

---

charges for transportation services, without unjust discriminations, undue preferences, or advantages, or unfair or destructive competitive practices; to cooperate with the several States and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions; —all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service and of the national defense. All of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy."

distributed, costs of carriage.[11] It was thought undesirable that one mode should undercut the rates of a competing lower-cost mode. Such conduct savored of a predatory competitive practice. See *Dixie Carriers* v. *United States*, 351 U.S. 56, 59, and n. 5 (1956). And generally it was possible to destroy a lower-cost carrier or mode only by reducing rates, at least temporarily, to a level below the costs of

[11] See *Dixie Carriers* v. *United States*, 351 U.S. 56, 59 (1956) ("'lower cost of equipment, operation, and therefore service'"; Congress' fear was lowering of rates by "strong" carriers, putting more efficient carriers out of business, citing 84 Cong. Rec. 5874); Statements of Chairman Freas before the Senate Committee on Interstate and Foreign Commerce, Hearings on S. 3778, 85th Cong., 2d Sess. (1958) ("In many instances, however, the full cost of the low-cost form of transportation exceeds the out-of-pocket cost of another. If, then, we are required to accept the rates of the high cost carrier merely because they exceed its out-of-pocket costs, we see no way of preserving the inherent advantages of the low cost carrier."); Colloquy between Senators Kefauver and Smathers, 104 Cong. Rec. 10859 (1958) ("Mr. Kefauver: * * * Some people have expressed the belief that under [15a(3)] it would be possible for one type of carrier to lower its rate to such an extent that another carrier would not be able to compete fairly on the basis of charging the overhead to that other carrier. There is nothing in [15a(3)], is there, which would enable one carrier to take undue advantage of another carrier * * *?" "Mr. Smathers: No. The answer is no.")

It will be observed that Congress had very different ideas as to what out-of-pocket and fully-distributed costs are than did the Commission. If Congress had realized that "railroad operating expenses include virtually all important railroad costs except property taxes and interest payments," see Appendix A, *infra*, it might have acted differently. But that, of course, is not a matter for our decision.

either. It well may be that for the higher-cost mode to jeopardize the continued existence of a lower-cost mode by setting rates below the costs of each, could be characterized as a "destructive competitive practice" which under another NTP policy-factor was not to infect the "reasonable charges for transportation services" which the Commission was authorized to approve. But that is not this case, as we will now proceed to show.

The Commission in its report expressly admitted (R. 46) that, "we can not determine on these records where the inherent advantages may lie as to any of the rates in issue." It thus made it plain that it did not rest its holding on the "inherent advantages" factor of the NTP. Instead, it turned to another NTP factor to justify its decision. It said, at R. 44, the "TOFC rates here under investigation, with the few exceptions noted, appear to be compensatory. Many of these are above the fully-distributed costs shown, and with the exceptions mentioned, all are above out-of-pocket costs. The next, and *the most important, question is whether these rates constitute destructive competition.*" (Emphasis supplied.) And that the Commission did, at least in part, base its decision upon a holding that the proposed TOFC rates were an "unfair or destructive competitive practice" such as it thought frowned upon by the NTP, is demonstrated by its statement that: "The reduced rates of the railroads here under consideration are an initial step in an overall program of rate reductions that can fairly be said to threaten the continued operation, and thus the continued existence, of the coastwise water-carrier industry generally." R. 47. Apparently the Commission thought that any

rate-competition which threatens the continued existence of a competitor it had power to prevent as a "destructive competitive practice," irrespective of whether the challenged rates were compensatory to the proponent thereof or whether the mode of the contesting competitor was a lower-cost mode than that of the proponent.[12] This, we hold, has an erroneous interpretation of the Act, as amended.

Even before 1958, it would have been erroneous to hold that irrespective of other factors rates were unlawful merely because they would destroy carriers operating under different modes of transportation. In *Schaffer Trans. Co.* v. *United States*, 355 U.S. 83, 91 (1957), it was said that "[t]he ability of one mode of transportation to operate with a rate lower than competing types of transportation is precisely the sort of 'inherent advantage' that the congressional policy requires the Commission to recognize."

Prior to 1958, the Commission's emphasis as between different factors of the NTP had vacillated; now allowing rate reductions to "recognize and preserve * * * inherent advantages," see *New Automobiles in Interstate Commerce*, 259 I.C.C. 475, and later shifting its stress to "coordinating * * * a national transportation system" even at the cost of stifling compe-

[12] That the Commission considered itself vested with a power of such sweeping breadth is further demonstrated by its stated conclusion herein (R. 50) that the water carriers must be favored by a differential under railroad boxcar rates, albeit a somewhat smaller differential than the 6% differential required of TOFC rates. Yet as to boxcar costs the Commission had found only that on some of this traffic Sea-Land "is shown as the low-cost agency; on the other traffic, the railroads' costs appear to be lower." R. 46. This surely falls far short of a finding that Sea-Land's is the low-cost mode.

tition, as in *A. W. Schaffer Extension—Granite,* 63 M.C.C. 247, rev'd *sub. nom. Schaffer Trans. Co.* v. *United States, supra.*

Against this background of vacillation, the Transportation Act of 1958 was adopted. We think that, on the whole, the amendment of section 15a was intended to provide freer play for competition as between different modes while still continuing protection to the modes having the inherent advantage of low cost from unfair or destructive competitive practices. In this the Congressional history, while perhaps not conclusive, bears us out. In H.R. Rep. No. 1927, 85th Cong., 2d Sess. (1958), 2 U.S.C.C.A. 3470 (1958), it had been said: "* * * The Interstate Commerce Commission has not been consistent in the past in allowing one or another of the several modes of transportation to assert their inherent advantages in the making of rates." This House Report on § 15a (3) in its final form said, further: "The effect of this amendment will be to encourage competition between the different modes of transportation for the benefit of the shipping public." It quoted with approval the above excerpt from the opinion in *Schaffer Trans. Co.* v. *United States, supra.*

The report of the Senate Committee of June 3, 1958 (S. Rep. No. 1647, 85th Cong., 2d Sess.) said of § 15a (3) in its final form,

> "The committee wishes further to emphasize that the amendment in regard to section 5 amending section 15a of the act as framed by the committee is *designed to encourage competition* in transportation by allowing each form of transportation subject to the Interstate Commerce Act full opportunity to make rates reflecting the inherent advantages each has to

> offer, with such ratemaking being regulated by the Interstate Commerce Commission, however, to prevent 'unfair or destructive competitive practices' as contemplated by the declaration of national transportation policy. Under the committee amendment *the principal emphasis,* but not the exclusive emphasis, in a competitive ratemaking proceeding involving different modes of transportation *will be on the conditions surrounding the movement of the traffic by the mode to which the rate applies.*" [Emphasis supplied.]

Having in mind that by the 1958 amendment Congress for the first time articulated an express, though qualified, prohibition against holding up the rates of one mode to protect another, a prohibition accompanied by a direction that consideration shall be given to the effect of rates on the carrier for whom they are prescribed, we are unable to accept the contention in the government's brief that "section 15a(3) brought about no fundamental change in the law." We think that Congress in adopting the 1958 amendment, which its committees thought would encourage competition, did not intend the included prohibition of compulsory rate differentials to be nullified merely because of the adverse effect of rate competition on another mode of transportation even if carried to the point of rendering one mode of transportation obsolete and hence unable to survive. Instead, we think, the differential-prohibition was intended to be qualified only when factors other than the normal incidents of fair competition intervened, such as a practice which would destroy a competing mode of transportation by setting rates so low as to be hurtful to the proponent as well as his competitor or so low as

to deprive the competitor of the "inherent advantage" of being the low-cost carrier. The "inherent advantage" factor and the "destructive competitive practice" factor were the only two policy factors mentioned in the committee reports. We think the reference to the NTP in § 15a(3) indicates an intent that the differential prohibition was to be qualified only when necessary because of the interplay of these two factors.

We cannot help wondering if the Commission's obvious reluctance to accept as critical the relative costs of service by the competing modes of transportation may not be attributable less to its interpretation of the applicable law than to its fear that the process which it has developed of so-called value-of-service ratemaking will be jeopardized if it be required to make critical findings as to the comparative costs of competing modes of transportation.

Value-of-service ratemaking is a price-discrimination device, used either to maximize profit or to subsidize certain interests. As a maximizing tool, it can be used by a monopolist in the following way. M has a product—transportation—with two potential buyers, A and B. A uses it to ship industrial sand which he sells for $10 a ton, B to ship coal which he sells for $35 a ton; M's cost of shipment is the same for both. If he sets a uniform rate per ton of $2, B will ship but A will not—he will not be able to meet his competition at the market. If M sets his price at a uniform $1 per ton, both will ship—but M will lose a greater revenue which he could have garnered from B. And if M's out-of-pocket cost of carriage is $0.75 per ton, he will want A's $1 traffic. Early railroads thus developed the practice of charging $2 to B and $1 to A, cost of carriage notwithstanding.

This value-of-service pricing is not necessarily unsound economically. Economists generally agree that:

> "Preferential rates relieve rather than burden other traffic if two conditions are fulfilled. These are (1) that the rate must more than cover the direct costs; and (2) that the traffic will not move at higher rates." [13]

And the ICC, partly because this was the rate pattern prevailing when the Commission was established, and partly to maximize utilization of the railroads, adopted value-of-service as its own criterion of ratemaking.

The Commission, however, added factors of discrimination other than profit maximization. One of these is subsidization of certain commodities producers, perhaps under political pressures. Thus corn is carried at 85 percent of out-of-pocket costs; beets at 57 percent; gravel and sand at 88 percent; logs, at 62 percent. And of course, passenger traffic has been carried at a loss for some time. These losses are made up on other traffic, such as gasoline, 135 percent; equipment parts, 236 percent; and metal alloys, 264 percent.[14] Other discriminations sometimes introduced by the I.C.C. are attributable to its desire to act as an economic planner, see, *e.g.*, *Anchor Coal Co.* v. *United States*, 25 F. 2d 462, 470 (1928).

These official discriminations, hallowed and encrusted by time and inertia, now pervade the rate structure; indeed they are the rate structure. The rates on high-value commodities are thus twice subject to arbitrary boosting. First, they bear as part of

---

[13] *Locklin, Economics of Transportation* 158 (1954).

[14] These figures are from *ICC, Bureau of Accounts & Cost Findings, Distribution of Rail Revenue Contribution by Commodity Groups, 1952, Table 12 (1955).*

their "cost" the subsidies extended to traffic which does not pay the out-of-pocket cost of its carriage. And second, high-value commodities are expected to yield for the carriers a profit above their fully-distributed costs sufficient to compensate for any deficiency in the fully-distributed costs of other traffic.

This disquisition may help to an understanding of what the I.C.C. attempted and did in this controversy. It serves to point out that "cost" as used by the I.C.C. is a term of art. "Fully-distributed costs" of operation are actually the I.C.C.'s estimate of returns necessary to continued profitable operation. "Fully-distributed cost" of a given service is a largely arbitrary estimate of the proportion of system "costs" which the I.C.C. feels a given service should contribute to total revenue. For example, under the Commission's scheme of ratemaking the "fully-distributed cost" of the TOFC freight service is set at a level high enough to absorb, in addition to direct freight expenditures, the TOFC "share" of the eastern railroads' passenger-operations deficit. See Appendix A.

Thus the Commission was inhibited, by the terms of its own analysis, from a meaningful comparison of TOFC's cost to Sea-Land's cost. The "costs" of TOFC for these 66 movements were the sum of the following components: direct TOFC costs, a judgment of the appropriate shares of subsidy owned by TOFC to other railroad traffic, and an estimate of what contribution to total railroad revenue the high-value commodities here involved should make. Except for the application of value-of-service criteria Sea-Land "costs" were not complicated by these extrinsic factors. In short, under the Commission's scheme, TOFC costs and Sea-Land costs were incommensurate quantities.

But this lack of real significance in its cost comparisons is almost academic when set against the Commission's method of decision. That process, as nearly as we can trace it, was as follows. First, Sea-Land's overall revenue needs were calculated by the process outlined in Appendix A. Value-of-service criteria were then applied to determine the share of its needs to be met by the commodities in question. From this figure was derived the "fully-distributed cost" of Sea-Land's carriage of these items. The railroads, in effect, were then ordered to leave the traffic with Sea-Land by maintaining their rates at a 6 percent differential. This conclusion was bolstered by a recital of TOFC "costs" computed as we have seen on an essentially different basis. The effect was to obscure, rather than illuminate, the identification of the "low-cost" mode.

If, instead of cancellation, the disposition of the proposed rates had been one of approval, and forced Sea-Land to reduce its own rates on the commodities involved, it is true that the substantial extra margin of profit the Sea-Land rates provide for the company as a whole, which is available to augment the lower profits from the revenues of low-value movements, will be reduced. This, we think, is what the Commission meant when it said: "The reduced rates of the railroads here under consideration are an initial step in an overall program of rate reductions that can fairly be said to threaten the continued operation, and thus the continued existence, of the coastwise water-carrier industry generally." R. 47. Apparently, the Commission thought that any competition having such effect on water carriers, i.e., to reduce rates on high-value commodities, was necessarily "an unfair or destructive competitive practice" within the meaning of the statutory declaration of the NTP.

Such an interpretation of the Commission's decision might avoid some of the difficulties we find with that order; for example, it would explain why the Commission refused to allow TOFC rates to be lowered to a level still above the railroads' fully-distributed costs. But if the Commission decision does represent such an attempt to preserve its value-of-service ratemaking structure, the decision must fall for lack of evidence and necessary findings. For the Commission would have been warranted in holding up the TOFC rates for these 66 movements to protect an *integral overall rate structure* for Sea-Land only on evidence and findings that, notwithstanding the § 15a(3) prohibition of differentials, the *integral overall rate structure* was required by one or more of the policy-factors enumerated in the NTP, and particularly the policy to protect the "inherent advantages" of the overall structure against "destructive competitive practices" and "the need, in the public interest, of adequate and efficient railway transportation service at the lowest cost consistent with the furnishing of such service." Sec. 15a (2).

There was no finding here that the *overall rate structure* of Sea-Land which the Commission sought to preserve was that of the *overall low-cost mode*. This finding the Commission refused to make; indeed it could not, for as it said, "we do not have before us the rail costs as to many of these rates * * * we can not determine on these records where the inherent advantages may lie as to any of the rates in issue." True, it found that as to many of the 66 movements in question, Sea-Land was a lower-cost mode than TOFC; but it did not find that Sea-Land service was in general a lower-cost mode than railroad service in general. All-rail boxcar service, as well as TOFC, competes with Sea-Land, and as to many boxcar rates

the Commission's finding was, "the railroads' costs appear to be lower." R. 46. Yet the Commission concluded that Sea-Land was entitled to protection against boxcar competition, as well as TOFC competition, though by a differential "somewhat lower" than the 6% prescribed for TOFC. R. 50. See also I.C.C. I. & S. Docket No. 7454 (May 18, 1961). We conclude that, for lack of evidence and findings that Sea-Land was in general the low-cost mode, the action of the Commission, in so far as it sought to protect Sea-Land's overall rate structure, was an unlawful interference with the forces of competition fostered—not proscribed—by § 15a(3).

For its disregard of the differential-prohibition the Commission also places reliance on the "national defense" clause of the NTP. In this too, we think the Commission misinterpreted the law. True, the hoped-for "end" of the National Transportation Policy is a system "adequate to meet the needs * * * of the national defense." But the national defense is not stated as an operative policy or means: it is mentioned only as the hoped-for "end" of the operative policy-factors previously enumerated. It is not stated, and we think not intended, as a blanket grant of power to the Commission effective to nullify the express prohibition of rate differentials. By its emphasis on the supposed needs of national defense the Commission overrides the express prohibition of rate differentials without invoking, and without basis for invoking, the two policy-factors of the NTP, discussed above, which may properly qualify that prohibition. Its stress on national defense also brings it into conflict with all three policy-factors enumerated in § 15a(2), viz., the effect of the TOFC proposed rates on the TOFC carriers, the public need of railroad service at the lowest compensatory rate,

and the carriers' need for compensatory revenues. These three factors are as much a part of the national policy as the several policy-factors in the NTP declaration. Even if these factors were deemed to conflict with each other, we think it not proper to disregard the more recent expressions of Congressional intent contained in paragraph (3) of § 15a.

Moreover, we find scant basis of fact supporting the Commission's action even if its interpretation of the applicability of the "national defense" clause were correct. The pertinent evidence seems to be confined to: (1) a 1955 report of the U.S. Maritime Administration entitled "Review of the Coastwise and Intercoastal Shipping Trades." This report stresses the need for break-bulk capacity. Neither Seatrain nor Sea-Land now have such capacity. (2) S. Rep. 2494, 81st Cong., 2d Sess. (1950), which refers in passing to the importance of coastal shipping to the national defense. But the Senate Report is eleven years old, and does not seem to have resulted in legislation. Whatever its relevance in 1950, it must yield to the specifics of the 1958 Act. After all, so far as appears, compulsory rate differentials were not set up to protect the coastwise carriers at the expense of competing modes and the shipping public, from their tremendous loss of tonnage between 1940 and 1958. R. 27.

The Commission says that "shipper evidence * * * is indicative of a need by the general public for the services of these lines." R. 49. This statement assumes the matter for decision: since cost is a major factor, as long as the Commission maintains a rate differential shippers will "need" the lower-rate mode. Should the Commission heed the statute and allow the reductions, the "need" in evidence may well disappear.

The defendants' other arguments can be disposed of shortly.

The Commission indicates, and the government insists, that a full-fledged rate war is the inevitable consequence of allowing the proposed rate reduction. But surely, under its power to fix minimum rates, 49 U.S.C. § 15(1), the Commission will have power to disapprove rates not compensatory. Nothing in this opinion disparages that power.

Seatrain in its brief expresses fear that the proposed rates, if effective, would eliminate it as a competitor and suggests that the railroads might use its demise as an opportunity for rate increases. That bogie is laid at rest by 49 U.S.C. § 4(2). In other respects, the Seatrain position is largely that of Sea-Land and the government except that Seatrain produced no evidence from which its costs could be found. R. 38.

The government further argues that the proposed rates were disallowed not because a differential was needed to protect the water carriers but because the railroads failed to sustain the burden of proof. Thus it says in its brief: "when the proponents of a lowered rate which will deprive another mode of needed traffic, indeed deprive it of any opportunity to compete, fails to establish that the proposed rates are not cost-justified in that they reflect inherent cost advantages, then the rate should not, and certainly need not, be allowed." Beyond doubt, in the situation here, the burden was upon the railroads, as propondents, to submit evidence from which their own costs for the 66 movements could be determined. Indeed, the Act, 49 U.S.C. § 15(7), provides that "the burden of proof shall be on the carrier [who seeks a rate-change] to show that the proposed changed rate * * * is just and reasonable." But where, as here, a rate-

change is protested because of its effect upon a competing mode by one who claims to have the inherent advantage of lower costs, it is for the protestant to show its costs. This was expressly recognized in the dissenting report herein and not disputed in the majority report. And in the report of the Commission in No. 32920 on "Various Commodities from or to Arkansas and Texas," decided June 22, 1961, this rule was expressly recognized.

Finally, the government urges that even if the Commission's order was improperly based on a belief that the water carrier traffic, notwithstanding § 15a(3), should be protected, it would be futile and fruitless for us to set aside the order because the same order would then be made upon another ground, viz., that the water carriers were in fact the low-cost mode. As we have shown, no adequate basis for such a ground of decision is disclosed in the present record. But even if in this we are wrong, we cannot say what disposition the Commission would make of the controversy if authoritatively advised that the rationale of the report now before us is erroneous. In that event, it would be for the Commission, not this court, to decide whether the record should be reopened for further evidence and to evaluate the evidence. *Securities and Exchange Commission* v. *Chenery Corp.*, 318 U.S. 80 at pp. 87, 88.

Accordingly, the order requiring cancellation of the TOFC rates is set aside, and the Commission is enjoined from cancellation of TOFC rates which return at least the fully-distributed cost of carriage.

If, however, on some enlarged record the Commission shall find that the water carriers are in general the low-cost mode, and if it shall also find that value-of-service considerations demand water carrier rates on particular movements and commodities which

each return to the water carriers more than their fully-distributed costs, our injunction will not go so far as to prevent the Commission from requiring that TOFC rates be set high enough to protect water carrier traffic; provided, however, a railroad rate for a particular movement, if it yields the railroad's fully-distributed cost which is lower than the water carrier's fully-distributed cost, may not be disturbed. It is noted that at least two of the rates involved in this proceeding were found to fall in this two-pronged category. See R. 35.

A decree in accordance with this opinion may be submitted by the plaintiffs, on notice unless consultation amongst the parties shall bring about a waiver of notice.

Appendix A.

The I.C.C. report speaks freely of "out-of-pocket" costs and of "fully-distributed" costs but gives no definition to the sense in which it uses these terms. Since an understanding of the I.C.C.'s cost techniques is necessary to an understanding of its decision, we state in this appendix our understanding of the I.C.C. cost technique as gleaned from the sources indicated.

The I.C.C. employs different techniques for estimating railroad and water-carrier costs, reflecting the differing characteristics of each mode.

Water-carrier costs are calculated by traditional accounting methods, since they are "largely associated with the individual accounting unit," *Meyer, Peck, Stenason & Zwick, Competition in the Transportation Industries*, 112 (1959)—i.e., the operations of a given ship or ships. The costs for component items—including steamships, trucks, stevedoring charges, port charges, interest and depreciation, the motor service charges at each end of the voyage, and overhead—are calculated for representative voyages. Costs per ton-

mile are computed by applying average figures for tonnage and mileage.

Costs are then broken down into two categories, (1) "out-of-pocket" and (2) "fully-distributed." "Out-of-pocket" costs represent a rough approximation of the long-run *marginal* (i.e., added) costs of carriage. Estimates are made of the degree to which each of the cost components mentioned above—steamships, trucks, stevedoring, etc.—varies with the volume of traffic carried. To arrive at a ton-mile figure, non-varying expenditures (those attributable to size of plant rather than intensity of use) such as billing, terminal supervision, garages, etc., are subtracted from total expenditures, and the remainder divided by ton-miles carried. See *Rationale of Cost Finding Section,* Hearing Examiner's Proposed Report, I. & S. Docket No. M–10415, Appendix B.

"Fully-distributed" costs, by contrast, represent an approximation of the total long-run costs of remaining in operation. To obtain fully-distributed cost, corporate overhead is first added to "full" operation cost, i.e., to all direct expenditures. Then, on the basis of a 95% "operating ratio," i.e., the ratio between direct expenditures plus overhead, and fully-distributed costs, an allowance for profit is calculated which amounts to about 5.3% (.0526+) of direct expenditures plus overhead. The fully-distributed cost is the sum of this profit, the overhead, and direct expenditures. This method is used by the I.C.C. whenever capital investment is low, so that a return figure based on such investment would not reflect the size of operations. Sea-Land pressed this form of calculation because its vessels are largely chartered and its motor service hired. In this, the I.C.C. acquiesced. See *Rationale of Cost Finding Section,* I. & S. Docket No. M–10415, *supra.*

Railroad cost figures cannot be developed so easily. The basic difficulty is in "multiple use"—the tracks, rolling stock, terminal expenses, and even the trains themselves, carry mixed shipments to different destinations. Apportionment of costs to the different services offered is a complex and difficult process. For example, assume a train already made up and ready to go. What is the marginal or *added* cost of tacking on two more flatcars? Or should these two cars bear some proportion of costs incurred before they were added, which indeed would have been fully incurred even if the cars had *not* been added?

For accounting purposes, the cars are regarded as bearing a proportionate share of total cost—in other words, the marginal cost of added shipments is in reality average cost of all shipments. Commonly, costs per unit of output—or variable costs—are calculated by a formula of the type $Y=a+bX$, where Y is the ratio of total operating expenses to miles of track; a is "threshold" cost of operation, non-fixed investment which nevertheless must be made in some minimum quantity when *any* amount of activity is undertaken (such as the pay of one secretary—you can't hire one half a secretary); b is cost per unit of output and X is the ratio of gross ton miles of traffic to total miles of track. From the above formula, the I.C.C. derives what it calls a "percent variable." This is an expression of the proportion of variable costs to total costs—$\frac{bX}{Y}$. *Meyer, et al., supra*, at 274.

To estimate the costs of a particular service, the following procedure is used. Some costs, such as right-of-way maintenance, are developed for the system as a whole, on a gross ton-mile basis, and this average then applied to the movements in question. Other costs, capable of direct observation—*e.g.*, use

of switch engines, special equipment—are then added, after application of the "percent variable" derived earlier. The result is the "out-of-pocket" cost of service. See, e.g., *Rationale of Cost Finding Section*, at R. 54 and following.

For our purpose, it is important to realize what kinds of railroad expenses are attributed to a service by the I.C.C. in calculating "out-of-pocket" costs. (These expenses are included by attribution whenever they are not susceptible of direct observation.) Total operating expense "includes all the labor, fuel, and miscellaneous variable costs associated with the operation of trains, yards, and stations; it also encompasses marketing, advertising, selling and promotion expenses under the catch-all heading of traffic expenses; even supervisory and legal expenses are included; furthermore, the major portion of capital consumption costs is found in the maintenance-of-way and structure and in maintenance-of-equipment accounts. In short, railroad operating expenses include virtually all important railroad costs except property taxes and interest payments." *Meyer, et al., supra*, at 275. Furthermore, shares of these tax and interest payments, as well as a return figure, are then assigned to the particular traffic under investigation in order to calculate "out-of-pocket" costs. See R. 55.

"Fully-distributed" costs include, in addition to "out-of-pocket" costs: the non-varying portion of operating expenses (b in the formula); the remainder of taxes and interest; the remainder of capital costs; and a 4% return on investment. "Fully-distributed" costs of a particular service are then obtained by adding an aliquot share of the system's fully-distributed cost components to the calculated "out-of-pocket" cost of the service. Cf. R. 55–56.

APPENDIX B

United States District Court, District of Connecticut

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY, ET AL., PLAINTIFFS

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, DEFENDANTS

SEA-LAND SERVICE, INC., AND SEATRAIN LINES, INC., DEFENDANTS-INTERVENORS

Civil Action No. 8679

JUDGMENT

This cause having been heard on the plaintiffs' complaint seeking to enjoin, set aside, and annul a report and order of the Interstate Commerce Commission dated December 19, 1960 and the order dated February 3, 1961 in a proceeding styled *Commodities—Pan-Atlantic Steamship Corporation*, Investigation and Suspension Docket No. M-10415, which embraces a proceeding styled *Piggy-back Rates—Between East and Texas*, Investigation and Suspension Docket No. 6834, to the extent that such reports and orders found unlawful and unreasonable certain Trailer-on-Flatcar (TOFC) rates described more fully therein and included in Investigation and Suspension Docket No. 6834; and the parties appearing by counsel having been heard and the issues duly

tried; and the Court having concluded in its opinion that plaintiffs are entitled to judgment:

It is hereby Ordered, Adjudged and Decreed that the above described reports and orders of the Interstate Commerce Commission entered December 19, 1960 and February 3, 1961, to the extent that they found unlawful and unreasonable certain Trailer-on-Flatcar (TOFC) rates described more fully therein, be set aside and vacated in accordance with the opinion of this Court and that the Interstate Commerce Commission is hereby enjoined from enforcing them without prejudice to such further proceedings as the Commission may deem appropriate.

Issued at New Haven, Connecticut, this 8th day of January, 1962.

CARROLL C. HINCKS,
United States District Judge.
ROBERT P. ANDERSON,
United States District Judge.
WILLIAM H. TIMBERS,
United States District Judge.

APPENDIX C

Interstate Commerce Commission

Investigation and Suspension Docket No. M–10415[1]

COMMODITIES—PAN-ATLANTIC STEAMSHIP CORPORATION

Decided December 19, 1960

---

1. In I. and S. Nos. 6906 and M–11375, and embraced proceedings, and upon reconsideration in I. and S. No. M–10415 and embraced proceedings, sea-land local and joint single-factor through rates on numerous commodities, in trailerload, multiple

---

[1] In addition to the above-entitled proceeding and 23 others embraced therewith, listed in footnote 1 of the prior report, 309 I.C.C. 587, which are here reconsidered, this report also embraces 19 other proceedings initially decided herein following oral hearing on 3 separate records, namely:

I. and S. Docket No. 6834, Piggyback Rates Between East and Texas, and the following embraced proceedings: No. 32313, Commodities, Pan-Atlantic, Between East and Texas, and fourth-section application No. 34227, Trailer-on-flatcar Service Between Official Territory and Dallas-Fort Worth, Tex.

I. and S. Docket No. 6906, Commodities Via Pan Atlantic Between Texas, Louisiana, and Florida, and embraced proceedings: I. and S. Docket No. 6918, Bags and Boxes from New Orleans, La., to Florida, I. and S. Docket No. M–11051, Clay and Rosin from South to East, I and S. Docket No. M–11034, Canned Goods from Fort Pierce, Fla., to Brewster, N.Y., I. and S. Docket No. 6932, Petroleum Products from Baton Rouge to Miami, I. and S. Docket No. M–11264,

trailerload, and volume quantities, over single-line routes of Pan-Atlantic Steamship Corporation and joint-line routes of motor common carriers and Pan-Atlantic, from, to, and between numerous points in the East, on the one hand, and, on the other, points in the South and Southwest; also from and to points in the South, and between such points, on the one hand, and, on the other, points in the Southwest, found lawful, except as indicated in the report. Prior findings in I. and S. No. M-10415 and embraced proceedings, 309 I.C.C. 587, affirmed. The excepted rates ordered canceled.

2. In No. 32313, sea-land rates, except a rate of Pan-Atlantic, and rail-water-rail rates of Seatrain Lines, Inc., on numerous commodities over water-rail routes from origins in the East to Dallas and Fort Worth, Tex., found not shown to be unlawful. Unlawful rate ordered canceled.
3. In I. and S. No. 6834, proposed reduced trailer-on-flatcar rates on numerous commodities between points in official territory, one the one hand, and, on the other, Dallas and Fort Worth, found unjust and

---

Various Commodities, Pan-Atlantic Steamship Corporation, I. and S. Docket No. M-11259, Pan-Atlantic Steamship—Between East, South, and Southwest, I. and S. Docket No. M-11077, Commodities Via Pan-Atlantic from East to Florida, Louisiana, and Texas, and I. and S. Docket No. M-11361, Canned Goods from Fort Pierce, Fla., to New York, N.Y.

I and S. Docket No. M-11375, Tires, Chemicals, and Paint Via Pan-Atlantic, and embraced proceedings: I. and S. Docket No. M-11387, Commodities in Motor-Water-Motor Service from New Jersey and Pennsylvania to Florida, Louisiana, and Texas, I. and S. Docket No. M-11465, Various Commodities from East to South and Southwest, I. and S. Docket No. 6962, Roofing from New Orleans to Tampa, I. and S. Docket No. M-11421, Iron or Steel Castings or Forgings from Houston, Tex., to Buffalo, N.Y., I and S. Docket No. M-11436, Machinery from New Britain, Conn., to Lubbock, Tex., and I. and S. Docket No. M-11369, Aluminum and Junk from Mississippi and Alabama to the East.

unreasonable; and in the fourth-section application No. 34227, authority to establish and maintain the proposed trailer-on-flatcar rates without observing the long-and-short-haul provisions of section 4 of the Interstate Commerce Act, denied. Proposed schedules ordered canceled, without prejudice to the filing of new schedules in conformity with findings made.

4. Proceedings discontinued.

Appearances as shown in 309 I.C.C. 587, and in addition:

John P. Ganly for rail-carrier respondents in I. and S. No. 6834, applicants in fourth-section application No. 34227, and interveners in opposition in No. 32313.

A. J. Bordelon for protestant railroads in I. and S. No. 6906 and embraced proceedings, and Toll R. Ware for protestant railroads in I and S. No. M–11375 and embraced proceedings.

Ernest M. Sharp for the Houston Port Bureau, Inc., Arthur L. Winn, Jr., Samuel Moerman, and Walter J. Myskowski for the Port of New York Authority, James J. Fisher, Port Agent for the City of Providence, and Louis A. Schwartz for the New Orleans Traffic and Transportation Bureau, protestants in I. and S. No. 6834 and fourth-section application No. 34227, and interveners in support of a respondent in No. 32313.

REPORT OF THE COMMISSION ON RECONSIDERATION

BY THE COMMISSION:

These proceedings are related and will be disposed of in one report. It was agreed by the parties that all of the evidence in Investigation and Suspension Docket No. M–10415 and proceedings embraced therein could be referred to in the other proceedings and, to the extent relevant, would be competent evidence therein. As indicated in footnote 1, 43 separate

proceedings are embraced herein. The title case and the 23 proceedings embraced therewith were the subject of a prior report, 309 I.C.C. 587, which is here being reconsidered. The other 19 proceedings were the subject of 3 separate reports proposed by the examiner in Investigation and Suspension Dockets Nos. M–11375, 6834, and 6906, and embraced proceedings.

Exceptions to the proposed reports and replies thereto were filed by the respondents and the protestants. The issues have been orally argued before us. Our conclusions differ in part from those proposed. Exceptions and requested findings not discussed in this report nor reflected in our findings or conclusions have been considered and found not justified.

The issues presented are the justness and reasonableness of several sets of rates[2] involving different modes of transportation; namely, (1) certain reduced so-called sea-land rates of the Pan-Atlantic Steamship Corporation[3] (hereinafter called Pan-Atlantic) and the motor common carrier participants in its tariffs; (2) numerous rail water-rail rates of Seatrain Lines, Inc. (hereinafter called Seatrain) and (3) numerous proposed reduced rail trailer-on-flatcar rates, hereinafter called TOFC rates, which reflect substantial parity with the sea-land and Seatrain rates and which the railroads claim are necessary for them to compete for this traffic. The most important question before us here is whether, in attempting to meet the competition of Pan-Atlantic and Seatrain, the railroads may establish compensatory rates which are on a parity with the rates of those competitors, or whether the ratemaking provisions of the Interstate Commerce Act, interpreted in the light of the national

[2] Rates and charges are stated per 100 pounds, except as otherwise indicated.

[3] Name changed to Sea-Land Service, Incorporated, on April 1, 1960.

transportation policy, under the facts here presented, require that the rail rates on this traffic be maintained differentially higher than the rates of those competing modes.

The prior report in I. and S. Docket No. M–10415 and embraced proceedings set forth the history and description of the sea-land service of Pan-Atlantic, its advantages and disadvantages, rationale of the cost evidence, and other background material. A clear understanding of the related issues in these proceedings requires first a summarization of this evidence, after which we shall direct our attention to the issues and contentions of the parties in these proceedings.

The sea-land service of Pan-Atlantic in conjunction with certificated motor carriers, and by the use of its own motor equipment, moves merchandise freight in highway containers over motor-water-motor routes between the East, on the one hand, and the South and Southwest, on the other, and also between the Southwest and the South. The freight is moved from the shippers' docks over the highways in demountable highway containers to the port and thence lifted onto Pan-Atlantic ships for movement to the destination ports. At the destination ports the containers, with the freight intact, are lifted off the ships and onto highway trailers for delivery to the consignees' docks. This service is closely akin to railroad trailer-on-flatcar service with the substitution of the deck or the hold of a vessel for the rail flatcar.

Prior to the institution of sea-land service, Pan-Atlantic engaged in break-bulk water service, which also provided joint routes with motor common carriers and door-to-door service from consignor to consignee. In the prior break-bulk service longshoremen handled the lading into and out of the ships, whereas in sea-land service the containers with the lading are lifted

on and off the ships by the use of two gantry-type cranes on each vessel. Each crane is capable of unloading one trailer and placing another on board ship in about 5 minutes. These patented cranes are part of the ships, and eliminate the need for costly shore installations. The cranes make it possible to serve any port having adequate water and dockside aprons large enough to permit bringing a truck chassis alongside the vessels. Compared with the slower and more expensive break-bulk service, sea-land has reduced considerably Pan-Atlantic's costs, the cargo-handling time, the import vessel time, and its loss, damage, and pilferage expenses.

Whether the containers are loaded or empty, a full complement of 226 containers is carried on each voyage. To achieve the proper balance of the cargo, it is necessary that there be a systemized sequence of loading the trailer bodies. For this purpose, many of the outbound containers are assembled at a parking lot near the port at least 60 hours in advance of the vessel's arrival, and the bulk of the cargo must be delivered to shipside parking lots at least 12 hours before the arrival of the ship. The proper sequence of loading affects the trim of the vessel, the list of the vessel during and upon completion of loading, and degree of roll and stability. In addition, certain types of containers must be stowed in a limited number of positions only, depending upon the weight, the container construction, the cargo carried, and the destination. One truck breakdown en route to the parking lot from a pickup point could destroy the entire planned loading sequence for any one hatch. Generally, Pan-Atlantic cannot accept sea-land freight and load it on a ship the same day.

Both single-line and joint-line sea-land services are provided by Pan-Atlantic. It operates single line be-

tween ports and port terminal areas which it is authorized to serve, by use of its trailerships on the water and leased tractors and trailers on the land. In some instances Pan-Atlantic has operated single line as far as 60 miles beyond a port; its performance of such extensive "terminal" service was found to be without appropriate authority in *Central Truck Lines, Inc.* v. *Pan-Atlantic S.S. Corp.*, 82 M.C.C. 395.

The joint-line sea-land service of Pan-Atlantic extends well beyond the ports and port terminal areas. For example, electrical appliances may move joint-line motor-water-motor, from Somersworth, N.H., via the ports of New York (Port Newark, N.J.) and Houston to Dallas, Tex.

Presently, Pan-Atlantic is a wholly owned subsidiary of McLean Industries, Inc. The total investment in the new type sea-land operations made by McLean, or its subsidiaries or affiliates, aggregates between $40 and $45 million, of which about 50 percent was used for conversion of break-bulk type vessels to sea-land vessels, over $20 million for automotive equipment, and about $500,000 for procurement of terminal facilities, including docks, piers, staging areas, and warehouses.

Beginning in 1933, Pan-Atlantic operated as a conventional break-bulk carrier, except during the World War II years. In May 1957, it suspended its Atlantic-Gulf coastwise break-bulk service to provide vessels for conversion into trailerships. For its sea-land service in the Atlantic-Gulf coastwise trade, it converted four vessels into trailerships, each with a capacity of 4,000 tons of payload freight, and each holding 226 containers, of which 166 are stowed below deck and 60 on deck. The ships are 468 feet long and capable of a speed of about 15.5 knots, substantially

the same as when the ships were used in the break-bulk service.

Prior to World War II there were about 19 deep-water common carriers operating in the Atlantic-Gulf coastwise trade, employing about 139 vessels. In 1940, these water carriers transported more than 8,500,000 tons of cargo. Today, only two carriers are in this trade; namely, Seatrain and Pan-Atlantic, operating, respectively, six and four vessels. A comparison made by Pan-Atlantic shows that, between 1939 and 1956, inclusive, the tonnage handled by class I railroads in the United States increased 160.5 percent, and the tonnage handled by class I motor carriers increased 545.6 percent. Excluding bulk oil carried by Seatrain and Pan-Atlantic, the tonnage handled by water carriers in the Atlantic-Gulf coastwise trade during that period declined 79 percent.

Since World War II there has been a substantial expansion of commerce in the United States, particularly in the South and Southwest. An exception to the general growth of transportation has been the Atlantic-Gulf coastwise dry-cargo tonnage of the water service. Pan-Atlantic estimates that Seatrain operating at full capacity could transport about 1 million net tons annually, and that Pan-Atlantic could transport about 800,000 net tons per year (100 round-trip voyages with full loads of 4,000 tons in each direction). The total for the two water carriers would thus be 1,800,000 net tons, compared with over 8,500,000 net tons transported prewar by the water carriers in the same trade. Excluding bulk petroleum carried in tankers, Pan-Atlantic carried in excess of 1 million tons in its coastwise break-bulk service in 1950. In 1956 and 1957, it carried in coastwise service only 433,915 and 332,057 tons, respectively.

Traditionally, water rates, including water-rail and water-motor rates, have been maintained at levels differentially lower than the corresponding all-rail rates, principally because of disadvantages in the water service due to perils of the sea, slower transit time, and infrequency of sailings. The last major proceeding in which the rates of the Atlantic-Gulf coastwise water carriers were considered was *Class Rate Investigation, 1939*, 286 I.C.C. 5 (docket No. 28300—1952). Therein, we prescribed reasonable maximum first-class rates on ocean-rail traffic, and also reasonable percentage relations of the lower classes to first class, between North Atlantic ports and interior points in eastern seaboard territory, on the one hand, and, on the other, New Orleans and Baton Rouge, La., Texas-Gulf ports, and interior points in the Southwest. Those class rates were designed to preserve the then existing differentials of the ocean-rail rates under the all-rail rates.

The prescribed rates in No. 28300 were class rates, whereas in the instant proceedings only commodity rates are in issue. When it inaugurated the sea-land service, Pan-Atlantic evaluated the rate structures of the existing water and overland carriers and concluded that its sea-land service needed rate differentials under all-rail rates, but that lesser differentials would suffice than those maintained under its previous break-bulk service.

For its trailership service, Pan-Atlantic first put into effect class rates, and later commodity rates. Generally the class rates were protested, but were not suspended and became effective. Many of the commodity rates were suspended and are under investigation in these and other proceedings. The class-rate structure established by Pan-Atlantic varies depending upon origins and destinations, the direction of the

competing rail ratemaking routes, the constructive water mileages, and the prescribed maximum ocean-rail rates, among other factors. Generally, its trailership class rates are on the basis of 92.5 percent of the overland-carrier rates on terminal (port) to terminal (port) traffic, and on the basis of 95 percent of the overland rates on traffic moving from, to, or between interior points located beyond the terminals (ports).

The commodity rates for its trailership service in general were related percentagewise to the all-rail commodity rates in the same measure as the sea-land class rates are related to the all-rail class rates. As there are exceptions to the 92.5–95 percent formula in the class-rate structure, so also there are numerous exceptions to that formula for commodity rates. Individual adjustments are made in the latter rates because of varying competition with all-rail carriers, all-motor common carriers, Seatrain, a barge line, and exempt motor carriers. Also, there are instances where the sea-land rates were designed to preserve competitive relations between shippers located at different origins. The result is a wide fluctuation in the differentials between the sea-land rates and the all-rail commodity rates.

Pan-Atlantic contends that the primary accomplishment of its sea-land trailership service lies in the reduction of its internal operating expenses, rather than in any substantial improvement in the value of its service to the public. The expenses in the present sea-land trailership operation are from $10 to $12 per cargo ton less than those incurred in the previous break-bulk type operation. This reduction in expense is mainly a result of the reduction in cargo-handling time and in port vessel time. On the other hand, the rail and motor carriers generally contend that there has been a substantial

change in the character of Pan-Atlantic's service from the old break-bulk service to the new trailership service, and particularly in its value to the shipping public. Pan-Atlantic's own literature and public advertisements represent that its trailership service will save transportation costs, avoid delays, prevent damage, and accomplish a reduction in loss, damage, and pilferage.

The views of the shippers on the comparative value of sea-land service to rail service were many and varied, according to their individual transportation problems. Door-to-door service is an important consideration to many shippers. In sea-land service, the lading often moves in a sealed trailer from the door of the consignor to the door of the consignee without being handled en route. Where a shipper or consignee does not have a private or assigned rail siding, the sea-land service has a distinct advantage over rail service, the same as all-motor service. Thus, some New York City consignees do not have private or assigned sidings, which makes drayage necessary when using all-rail service. A survey made by Pan-Atlantic showed that out of 2,350 of its potential shippers and consignees, 1,805, or about 77 percent, had private rail sidings, while 545 were either not located on rail sidings or were served by team tracks.

Among other factors considered by the shippers in determining the value of the respective services are time in transit, frequency of service, costs of loading and unloading, cost of blocking, dunnage, and bracing, loss or damage, and the availability of stop-off privileges. The testimony of the shippers on these value-of-service factors is recounted in detail in the prior report. Generally, their testimony was inconclusive and failed to show whether the water carriers' service or the rail carriers' service is more

valuable to the shippers by reason of these compared factors.

The most important, and usually the determinative, factor to the shippers as a whole is the measure of the rates. Most of the shippers would not use sea-land service at rates equal to or higher than all-rail or all-motor rates. A number of shippers also would not use sea-land service at rates higher than those of Seatrain. Some shippers who would not use sea-land service if Pan-Atlantic's rates were equal to the rail rates, also would not offer any of their traffic now moving by sea-land service to the railroads if the rail rates are maintained at the present differentials over sea-land rates. Certain other shippers would not use all-rail service even at differentials under all-motor or sea-land rates. Price competition in the sale of some commodities is so keen that the shippers thereof cannot pay a transportation premium for one mode of service as against another.

As indicated, the proceedings herein were heard on four separate records under the lead docket numbers, I. and S. Dockets Nos. M–10415, 6834, 6906, and M–11375, and for convenience of further discussion the other pertinent facts and contentions of the parties are hereinafter discussed under those respective numbers.

The reduced sea-land rates of Pan-Atlantic and the rail-water-rail rates of Seatrain here under investigation have become effective; the effective date of the proposed reduced T.O.F.C. rates has been voluntarily postponed by the rail carriers. For convenience, the rates under investigation will sometimes be referred to as the proposed rates.

In the prior report in these proceedings, division 3 considered the lawfulness of approximately 469 proposed reduced commodity rates of Pan-Atlantic and the motor common carrier participants in its tariffs for the transportation in sea-land service of numerous commodities in trailerload, multiple trailerload, and volume quantities from, to, and between numerous points in the East, South, and Southwest.

Generally, the proposed sea-land rates are lower than the all-rail boxcar rates. In a few instances, for example where there are several rates and minima on a commodity, the all-rail rates are lower than the proposed sea-land rates at the higher minima. Certain of the proposed sea-land rates are listed in appendix A to the prior report, together with the sea-land costs and corresponding all-rail rates and costs. The sea-land costs are broken down between the Pan-Atlantic portion and the motor-carrier portion. Also shown in that appendix are representative examples of the ratios of the sea-land rates to the sea-land costs, and the ratios of the sea-land costs to all-rail costs. The costs shown in that appendix are those obtained from a restatement of the sea-land costs by our cost finding section. The detailed rationale of the restatement is found in appendix B to the prior report.

Of the 489 rates listed, including 20 rates canceled under special permission, 13 failed to yield out-of-pocket cost, and 145, or about 30 percent, failed to yield fully distributed cost. In the circumstances presented, division 3 concluded that a lawful rate need not necessarily yield fully distributed cost. Some of the sea-land rates are more than double the out-of-pocket costs and nearly double the fully distributed costs. Other sea-land rates exceed the

costs by narrower margins. Of the 13 rates which failed to cover out-of-pocket costs, 2 were canceled under special permission.

In the prior report, division 3 found the proposed reduced sea-land rates of Pan-Atlantic not unlawful, except 11 rates on the commodities and from and to the points shown in the footnote below,[4] which failed to cover out-of-pocket costs. The latter rates were found not shown to be just and reasonable, and ordered canceled.

Upon petition of the railroad protestants, to which the respondents replied, we reopened the proceedings for reconsideration on the present record. The rail protestants do not seek reversal of the prior finding that, with the exceptions noted, the proposed sea-land rates are not unlawful. They do not question that finding. Their request for reconsideration is based upon the ground that the division strongly inferred in its report that in its consideration of any future rail-rate adjustments on this traffic, it would disapprove rail rates that would eliminate rate differentials in favor of sea-land. The protestants admit that no differentials or rate relationships which would prevent the adjustment of rail rates in the future were prescribed, but they object to the following paragraph on page 606 of the prior report:

> There is indication that if the proposed rates are approved, the all-rail carriers intend to counter with reduced rates of their own. In

[4] Shipping carriers (empty barrels and bottles) from Daytona Beach, Fla., to Philadelphia, Pa.; canned goods from New Orleans, La., to Baltimore, Md., and Rochester, N.Y., from Gulfport, Miss., to Philadelphia, and from St. Francesville, La., to Miami, Fla.; pulpboard from Bogalusa, La., to New York, N.Y., and from Kreole, Miss., to New York and New Brunswick and Wharton, N.J.; and synthetic plastics from Baton Rouge, La., to Baltimore and Rome, N.Y.

> such event, they should take into account the effect thereof upon the national transportation system and the implications of the national transportation policy, consideration of which is required by the established rules of ratemaking.

The railroads also object to the conclusion on page 605 that "the evidence indicates that the 'sea-land service generally must have rates lower than those by rail in order to attract any substantial volume of this traffic.'" They argue that this conclusion rests solely upon the unsupported belief that sea-land is an inferior service and that it must be protected from the price competition of the railroads. These protestants request that the report be so modified as to make clear that the approval of any of the sea-land rates does not constitute a prescription or approval of differentials in favor of sea-land rates compared with rail boxcar rates.

The prior report is criticized also by the railroads for its failure to adopt the examiner's conclusion that, comparing the rail boxcar service with the sea-land service, the cost studies indicate that the railroads are generally the lower cost agency. In this connection, the division, while accepting the cost finding section's restated costs, stated at page 605:

> We do not have before us either the rail or sea-land costs as to many of these rates, and there is a complete absence of any all-motor costs. Moreover, as above discussed, other considerations enter into the factor of inherent advantages. For these reasons, we cannot determine on this record where the inherent advantages may lie as to each commodity, and still less as to each particular rate.

The foregoing conclusion of the division was based primarily on the fact that the all-rail costs submitted by the railroads dealt with 268 movements whereas

469 sea-land rates are involved. Either rail class or commodity rates are published from and to all of these points.

The ultimate conclusion of the cost finding section as to the lower cost agency was included in the examiner's proposed report, but was omitted in the division's report. The parties stipulated that the several cost studies could be referred to the cost finding section for analysis. Since that section has been cast in the role of an expert witness, its conclusion in the analysis should have been included in the report. That conclusion is that a comparison of the sea-land costs with the all-rail costs of record shows that, for most of the movements where rail costs are shown, the sea-land costs exceed the all-rail costs of boxcar service, and that this latter relationship is more pronounced at high minimum weights. We have considered the cost finding section's conclusion along with other facts of record in reaching our conclusion herein.

Our disposition of the other arguments and contentions in the rail carriers' petition for reconsideration is reflected in the findings hereinafter made.

I. AND S. DOCKET NO. 6834

By schedules filed to become effective on November 14, 1957, and later, in I. and S. Docket No. 6834, the rail-carrier respondents proposed to establish new reduced rates listed in 27 tariff items on numerous commodities in TOFC service between [5] points in the

[5] With one exception, the proposed rates are southbound from points in the East to Dallas and Fort Worth. There is one northbound rate on bags, cotton, new or old, from Dallas and Fort Worth to Baltimore, Md. This northbound rate also applies from and to other points taking the same rates, as provided in the tariff.

East, on the one hand, and, on the other, Dallas and Fort Worth. Upon protests thereto, the operation of the schedules was suspended to and including June 13, 1958. The effective date of the schedules has been postponed voluntarily by the respondents.

In fourth-section application No. 34227, the respondent rail carriers seek authority to establish and maintain the above-mentioned TOFC rates without observing the long-and-short-haul provisions of section 4 of the act. The carriers propose to continue to maintain certain higher rates to and from intermediate origins and destinations. The proposed rates and the application for fourth-section relief in connection therewith are opposed by the Secretary of Agriculture of the United States, Pan-Atlantic, Seatrain, The Eastern Central Motor Carriers Association, Inc. (hereinafter called Eastern Central), the Houston Port Bureau, Inc., the Port of New York Authority, the city of Providence, and the New Orleans Traffic and Tranpsortation Bureau. No shippers or receivers located at the intermediate points oppose the granting of fourth-section relief.

In No. 32313, by order dated November 8, 1957, an investigation was instituted into effective rates of Pan-Atlantic listed in 22 tariff items in connection with its sea-land service on numerous commodities from origins in the East to Dallas and Fort Worth. By first supplemental order dated December 18, 1957, the investigation was broadened to include certain effective rates of Seatrain in connection with its rail-water-rail service from eastern origins to Dallas and Fort Worth. The sea-land and Seatrain rates are opposed by the rail carriers and by Eastern Central.

The proposed TOFC rates are on a parity with the present sea-land rates, and are substantially the same as the Seatrain rates. Since the railroads are

parties to the Seatrain rates to the extent that such rates apply from inland points, technically the railroads are respondents in No. 32313, but they are not defending the Seatrain rates.

The background of the TOFC and other rates.—The railroads published the proposed TOFC rates on a parity with the current rates for the sea-land service upon the assumption that these two operations, which have many of the characteristics of overland motor-carrier service, are equivalents from a quality standpoint, and that therefore, in the absence of special circumstances, they should be priced at the same level. Generally, as stated, Pan-Atlantic and Seatrain contend that the water-carrier services are entitled to rates differentially lower than the rates of the overland carriers. Eastern Central takes the position that TOFC rates generally should be continued on the level of the motor common carrier rates, and that if TOFC rates are reduced the motor-carrier rates also will have to be reduced. It urges that the railroads in their proposed TOFC service may not find it necessary to meet the exact Pan-Atlantic rates, and that the record may warrant a differential of the Pan-Atlantic rates under the TOFC rates, which it believes, however, should be less than the differentials presently maintained.

Rail TOFC service between points in the Southwest and points in the western part of official territory, including Pittsburgh, Pa., was inaugurated on June 13, 1956. Later, on September 8, 1956, the official-territory origins were extended to include points east of Pittsburgh. For this service, rates were published generally on a parity with the prevailing motor-carrier rates. When Pan-Atlantic inaugurated its sea-land service between the Southwest and the East in the fall of 1957, the railroads were

convinced that they could not compete without a reduction in their TOFC rates. They decided to publish TOFC rates on the same level as the sea-land rates, but not between all origins and destinations. It was their intention to publish the TOFC rates herein from selected points in official territory to Dallas and Fort Worth as a limited pilot or trial effort to meet the sea-land rates. A wholesale reduction in the TOFC rates would have disturbed competitive patterns between the railroads and the motor common carriers, and also would have created competition among the rail services, because the TOFC rates on the sea-land basis in many instances would have been lower than the all-rail boxcar rates.

Since the proposed TOFC rates were made applicable only to the destinations of Dallas and Fort Worth, they would result in fourth-section departures. Avoidance of these departures would have entailed substantial reductions in rail revenues at intermediate points well outside the sphere affected by the sea-land competition. There is such competition at Dallas and Fort Worth.

The general rate situation among the various carriers herein is illustrated by the rates on candy and confectionery. For example, from Naugatuck, Conn., to Dallas and Fort Worth, the sea-land rate is 207 cents, minimum 36,000 pounds, and this is also the proposed TOFC rate. The Seatrain rate from and to the same points is 208.25 cents, minimum 65,000 pounds. The present all-rail boxcar rate is 220 cents, minimum 36,000 pounds, and the corresponding all-truck rate in effect prior to December 9, 1957, was 284 cents, minimum 23,000 pounds.

The proposed TOFC rates, in reflecting parity with sea-land rates, at times go below the Seatrain rates. The sea-land rates are not always the same as the

Seatrain rates, and there are differences also in the minimum weights. In part, the differences between Seatrain and sea-land rates are caused by the variations in the application of general increases on the single-factor sea-land commodity rates and on the combination rail-water-rail Seatrain rates. Where the Seatrain rates are competitive with the rates of the overland carriers, it is the intention of Pan-Atlantic to eliminate minor differences between its rates and the rates of Seatrain by adjusting the sea-land rates to the level of the Seatrain rates. In those instances where Pan-Atlantic does not consider the Seatrain rates to be competitive with the rates of the overland carriers, it intends to maintain differentials so that the sea-land rates will be about 5 percent under the overland competitive rates.

Sea-land and TOFC costs.—Extensive cost evidence was submitted by the rail carriers and by Pan-Atlantic, and, as requested by the parties, this evidence has also been considered by our cost finding section, which has restated the TOFC costs and the sea-land costs. Representative rates, restated costs, and cost ratios are shown in appendix A hereto. The rationale of the restatement of the TOFC costs appears in appendix B. The rationale of the restatement of the sea-land costs is the same as that used in connection with I. and S. Docket No. M-10415, and others (appendix B of the report therein), and will not be repeated here.

The sea-land rates.—The sea-land rates, with one exception, exceed the restated out-of-pocket cost of performing the service, and they range as high as 258 percent of the out-of-pocket cost. The one exception is the rate of 216 cents, minimum 20,000 pounds, on paint and paint materials, from Baltimore to Dallas and Fort Worth, for which the restated out-of-pocket

sea-land cost is 217 cents, or 1 cent more than the rate. There is no corresponding proposed TOFC rate, minimum 20,000 pounds. There are under investigation herein both a sea-land and a proposed TOFC rate on paint and certain other commodities from Baltimore of 187 cents, minimum 36,000 pounds, which rate exceeds the out-of-pocket costs by sea-land and by TOFC. Most of the sea-land rates herein also exceed fully distributed costs.

The restated sea-land costs, both out-of-pocket and fully distributed, are below the restated TOFC costs for all movements of comparable weight as computed for railroad-owned flatcars having a capacity of a single trailer and equipped with tiedown devices. In connection with flatcars not presently owned but leased by the railroads, designed to hold two trailers with special holddown devices (hereinafter called T.T.X. cars), the restated sea-land costs are below the restated TOFC costs for all except 2 of the 66 movements listed in the restatement. We conclude that, generally, for the movements herein, the costs of record indicate that sea-land is a lower cost service than TOFC.

After inauguration of Pan-Atlantic trailership service to and from Houston, Tex., in October 1957, shipments were made in 1957 in connection with only 13 of the 22 Pan-Atlantic tariff items under investigation herein, and only 15 shipments moved under 7 of those 13 items. The record does not disclose the amount of traffic handled at rates in the other 6 active items, but on the whole the amount of traffic handled in sea-land service at rates in these 22 items in 1957 after inauguration of the service in October apparently was relatively small. There is no indication that Pan-Atlantic has moved any traffic at rates as high as competing all-rail boxcar or TOFC rates.

The proposed TOFC rates.—As shown in the restatement of costs by our cost finding section, the proposed TOFC rates equal or exceed the restated out-of-pocket TOFC costs computed for hauls with so-called average circuity (the shortline distance between the origin and the Chicago and East St. Louis, Ill., gateways and between these gateways and the destination, increased by 13 percent as an allowance for average circuity); for all listed movements by T.T.X. cars; and for all but 6 of 66 listed movements by railroad-owned cars. The proposed TOFC rates equal or exceed the fully distributed costs for 43 movements by T.T.X. cars and for 14 movements by railroad-owned cars. More trailers per car are carried on T.T.X. cars than on railroad-owned cars.

The six movements in railroad-owned cars which do not return out-of-pocket costs are electric switch boxes from Newark, N.J. (rate 240 cents, minimum 24,000 pounds, restated out-of-pocket cost 249 cents); foodstuffs from New York, N.Y. (rate 222 cents, minimum 24,000 pounds, out-of-pocket cost 249 cents); laundry sour from Baltimore (rate 169 cents, minimum 36,000 pounds, out-of-pocket cost 172 cents; and rate 195 cents, minimum 24,000 pounds, out-of-pocket cost 236 cents); alcoholic liquors from Baltimore (rate 267 cents, minimum 20,000 pounds, out-of-pocket cost 276 cents); and alcoholic liquors from Philadelphia (rate 280 cents, minimum 20,000 pounds, out-of-pocket cost 283 cents). As we have no way of knowing the percentages of this traffic which would move in railroad-owned cars and in T.T.X. cars, we conclude that the rates for these six movements are not shown to be compensatory.

The Seatrain rates.—The investigation herein of Seatrain rates is limited to those on three groups of commodities, briefly described as linoleum, ammuni-

tion, and candy and confectionery. The first commodity group is more generally described as floor coverings or related articles, including carpets, mats, rugs, coverings, and linoleum. The instant rates on linoleum range from 35.5 to 40.6 percent of the No. 28300 first-class rail-water-rail rates. In *William Volker & Co. of Texas, Inc.*, v. *Central R. Co. of Pa.*, 302 I.C.C. 757, the complainants assailed the combination rates on linoleum transported over rail-water or rail-water-rail routes, including rates from and to the origins herein. The assailed rates comprised in most instances the aggregates of intermediate rates, consisting in part of exceptions or commodity-rate factors. These rates produced higher charges than did rates established on the uniform classification basis. We found that for the future those assailed rates were unjust and unreasonable to the extent that they exceeded the contemporaneous uniform classification basis. Rates in conformity with that order, on the basis of 35 percent of first class, were published effective May 15, 1958. These rates, now in effect, are on a basis lower than that reflected by the Seatrain rates on linoleum under investigation herein. Accordingly, this phase of the investigation of Seatrain rates will not be further discussed.

The rates of Seatrain on ammunition here under investigation apply from Edgewater, N.J., to Dallas and Forth Worth on traffic originating at Bridgeport and New Haven, Conn. These proportional rates, when added to the all-rail factors from origin to Edgewater, produce combination rail-water-rail rates to Dallas and Forth Worth of 295 and 300 cents, respectively, minimum 40,000 pounds. These commodity rates alternate with higher rates, minimum 30,000 pounds, not here under investigation, which are based on classification exceptions. The Seatrain

commodity combination rates, minimum 40,000 pounds, are related to the corresponding all-rail commodity rates [6] by lesser differentials than are the Seatrain exceptions class rates to the corresponding all-rail exceptions class rates. The differential of 70 cents per 100 pounds of the rail-water-rail 30,000-pound rates under the corresponding all-rail rates results from the (exceptions) class rates prescribed or approved in docket No. 13535. The commodity combinations, minimum 40,000 pounds, reflect differentials of 39 cents or 56 percent, and 34 cents or 49 percent, respectively, from Bridgeport and New Haven, of the class-rate differential.

During 1957, Seatrain obtained a total of three carloads of ammunition from Bridgeport to Dallas and Fort Worth, and no movement from New Haven. One of the three shipments moved at the 30,000-pound rate and the other two at the 40,000-pound rate. Under the existing rates, Seatrain participated in only a small portion of the ammunition traffic. Obviously, if the ammunition differentials were replaced by rate equalization, Seatrain's competitive position would be weakened considerably.

The rates of Seatrain on candy and confectionery here considered are from Edgewater to Texas City, Tex., on shipments coming from specified origins in Connecticut, Massachusetts, New Jersey, New York, and Pennsylvania. These proportional rates, when added to the all-rail factors to and from the ports, produce combination rates subject to minimum weights of 50,000 and 65,000 pounds which alternate with certain class rates, minimum 36,000 pounds.

The existing all-rail rates on candy and confectionery are exceptions class rates, minimum 36,000

[6] Reference to all-rail rates means to existing all-rail rates, and does not refer to the proposed TOFC rates.

pounds. They are lower than the rail-water-rail class rates, minimum 36,000 pounds, and also lower than some of the Seatrain commodity combination rates, minimum 50,000 pounds. The Seatrain commodity combination rates, minimum 65,000 pounds, are lower than the existing all-rail exceptions class rates, minimum 36,000 pounds, by 5 cents at Camden, N.J., and Philadelphia, Pa., by 9 cents at Boston, Cambridge, Malden, Mansfield, and Milton, Mass., and Reading, Pa., by 11 cents at Naugatuck, and by 12 cents at Brooklyn, N.Y.

Of the 14 origins for candy herein, in 1957 Seatrain obtained only a total of 4 carloads, each over 65,000 pounds, from Mansfield. Thus, Seatrain participated in only a very small portion of the candy traffic. Obviously, if the candy differentials favorable to Seatrain were replaced by rate equalization, its competitive position would worsen considerably.

Seatrain costs.—No evidence was introduced by Seatrain or by any of the other parties herein concerning the cost of the Seatrain service or the compensatory nature of its rates. While it was agreed that the annual reports of all parties might be referred to, and materials therefrom used without proof of authenticity, subject to objections as to relevancy and materiality only, no specific reference to the Seatrain reports was made at the hearing. On brief, Seatrain states that data embodied in its annual reports clearly show the compensatory nature of its rates under investigation herein. We conclude that the evidence does not warrant a finding that the Seatrain rates are noncompensatory.

The comparative values of the TOFC, sea-land, and Seatrain services.—From the standpoint of the shipper, the TOFC service and the sea-land service

are similar in that both provide door-to-door motor-carrier service; that is, the shipment leaves the consignor in a motor-carrier trailer and arrives at the door of the consignee in the same motor-carrier trailer. In TOFC service, the trailer is moved on railroad flatcars, and in sea-land service the trailer body or box is moved on a trailership during the course of the line-haul movement.

Seatrain service is similar to all-rail boxcar service in that the service offers to the shipper the transportation of his lading in a rail car from consignor to consignee. To the extent that all-rail service has certain service disadvantages, such as in the case of a shipper not located on a private siding, these disadvantages also generally beset the Seatrain service. Seatrain at present offers service between the ports of Edgewater, on the one hand, and, on the other, Belle Chasse, La., and Texas City, using freight cars as containers. Seatrain contemplates the inauguration of a new so-called "seamobile" service, which is to be similar to Pan-Atlantic's sea-land service. Seamobile would use special containers which would be transferred readily between Seatrain vessels and highway trailers or rail cars.

The rail carriers regard Seatrain as offering a lower quality service than TOFC, and TOFC service as generally of higher quality than all-rail boxcar service. According to them, there is no indication that Seatrain service is of lower quality than all-rail boxcar service.

Generally, all of the parties agree that TOFC is a higher quality service than all-rail boxcar service. A number of shipper witnesses presented by Pan-Atlantic stated that they would not use sea-land service at rates equal to or higher than the all-rail rates. Although this testimony dealt primarily with a com-

parison of sea-land with rail boxcar service, inasmuch as TOFC is of higher quality than all-rail boxcar service, it follows that the testimony has application also to a comparison of sea-land with TOFC service.

On the other hand, a number of shipper witnesses presented by the rail carriers made statements to the effect that they would not use TOFC service unless the railroads offered piggyback rates equal to sea-land rates. Some of these shippers would not use carload boxcar service because their customers are not located on rail sidings, whereas sea-land service provided store-door delivery, and these shippers indicate that the railroads must provide TOFC service to compete with the sea-land service. One of these shipper witnesses stated that transit time has never been an important factor to it. Other shippers are concerned with transit time, and state that between certain points not in issue herein sea-land service has been faster than all-rail boxcar service.

Slower transit time is listed by Pan-Atlantic as one of its service disadvantages in relation to the proposed TOFC service. On four voyages during November and December 1957, the average transit time by sea-land was 13.98 days from eastern origins to Dallas and Fort Worth, and a study made by the rail carriers for all-rail boxcar service showed an average transit time of 10 days from New England to the Southwest and 9 days from trunkline territory to the Southwest. Generally, so far as this record shows, TOFC service has about the same or 1 day faster transit time than all-rail boxcar service. For cost purposes, the rail carriers and Pan-Atlantic used TOFC costs for trailer rental based on average round-trip times, respectively, of 13.4 days and 14 days. We conclude that the average one-way TOFC transit time from origin to destination is about 7 days, and that

sea-land service is generally slower than TOFC service.

Seatrain lists the same general disadvantages of its service in relation to the proposed TOFC service as were listed by Pan-Atlantic. Seatrain has two weekly sailings from Edgewater to Texas City, and two weekly sailings in the reverse direction. Seatrain time in transit by water between these ports is 6 days one way, and to this time there must be added from 3 to 5 days for the movements from New England or trunkline territory to Edgewater, and 2 days for the movement from Texas City to Dallas or Fort Worth. Seatrain transit time is slower than the proposed TOFC service. Seatrain also lists restrictions on the size of cars which its vessels are designed to handle, and the bunching of cars at destination when shipped via Seatrain to a multiple-car consignee, as additional service disadvantages. As stated, it is conceded by the parties that Seatrain offers a lower quality service than TOFC.

Generally, the rail carriers consider sea-land service to be superior to the Seatrain service. Pan-Atlantic contends that the railroad position is influenced by the fact that some of the railroads participate in the joint rail-water-rail operations of Seatrain, and that the railroads hope to make sea-land rates non-competitive with Seatrain, thus forcing Pan-Atlantic out of the Atlantic-Gulf trade. It states that many of the Seatrain rates are maximum rates prescribed for application by Seatrain in No. 28300, and that such rates cannot be condemned for application by Seatrain in the same manner that the railroads are seeking to have them condemned for application via Pan-Atlantic.

Seatrain takes the position that there is nothing of record to justify sea-land rates lower than Seatrain

rail-water-rail rates, and that sea-land truck-water-truck rates which are lower than Seatrain rates, either in the measure of the rate or by virtue of lower minimum weights, or both, are unjust, unreasonable, lower than competitively necessary, and therefore injurious to the rate structure and contrary to the national transportation policy. It asks that Pan-Atlantic be ordered to publish and maintain rates and minimum weights no lower than those maintained by and for the account of Seatrain in its rail-water-rail service.

The evidence shows that sea-land and Seatrain services, insofar as the water transportation is concerned, are substantially similar. Both transport cargo in containers on ocean vessels, in one case truck trailers and in the other, rail freight cars. In both, marine insurance is provided by the carriers. Both transport truckload or carload cargo from the consignor to the consignee in a single container without transfer of lading. A difference is that, unless the shippers and consignees are on sidings, door-to-door pickup and delivery cannot be made by rail car as in the case of motortruck trailers. Uncertainty of ocean transport, infrequency of sailings, and longer transit time than by TOFC, are factors present both in sea-land and Seatrain service.

Many shippers would not use sea-land service unless the sea-land rates were no higher than the Seatrain rate. One shipper at Syracuse, N.Y., whose plant was constructed for rail shipments, would prefer to ship by all-rail or by Seatrain, rather than by sea-land. At least one shipper would discontinue using Pan-Atlantic's service if the sea-land rates were increased above the Seatrain rates. This shipper and the others supporting Pan-Atlantic make no mention of the minimum weights attached to their sea-land

and Seatrain rates, and as between sea-land and Seatrain the record does not justify the prescription of equal minimum weights. Seemingly, the same minima would not be practicable since sea-land shipments use trailer bodies as containers whereas Seatrain shipments move in railroad cars.

It is the position of the water carriers herein that the proposed TOFC rates would precipitate a cycle of destructive competition, contrary to the national transportation policy. Seatrain states that if the TOFC rates are permitted to become effective it will publish immediately rail-water-rail rates reflecting reasonable differentials under the TOFC rates; that Pan-Atlantic could then be expected to publish rates no higher than Seatrain's rates and made differentially under the TOFC rates; and that the net result would be a rate relationship comparable to that now existing but on a substantially depressed basis. It stresses, what appears to us a reasonable conclusion, that the rate-cutting activity probably would not stop even at that destructive level, and that quite certainly a further vicious cycle of rate cutting would ensue.

FOURTH SECTION APPLICATION NO. 34227

Fourth-section application No. 34227 requests authority to maintain the proposed reduced TOFC commodity rates between specified points in eastern territory, on the one hand, and Dallas and Fort Worth, on the other, over the short tariff routes without observing the long-and-short-haul provision of section 4. The rates which would be maintained from and to the higher rated intermediate points are the present class or combination rates. The following are typical examples of the departures.

From Boston, Mass., to Dallas over the direct route composed of the lines of the Boston and Maine Railroad to Mechanicville, N.Y., The Delaware and Hudson Railroad Company to Binghamton, N.Y., the Erie Railroad Company to Huntington, Ind., the Wabash Railroad Company to East St. Louis, Ill., and the Missouri Pacific Railroad Company beyond, the distance is 1,965 miles, and the proposed rate on candy and confectionery is 214 cents. Over this route to Bald Knob, Ark., and Terrel, Tex., 1,543 and 1,930 miles, respectively, rates of 236 and 272 cents will be maintained. From Lancaster, Pa., to Dallas over the direct route composed of the lines of the Pennsylvania Railroad Company to East St. Louis, the Missouri Pacific to Texarkana, Tex., and The Texas and Pacific Railway Company beyond, the distance is 1,591 miles and the proposed rate 204 cents. Over this route to Arkadelphia, Ark., and Terrel, 1,311 and 1,555 miles, respectively, rates of 225 and 253 cents will be maintained.

The examples offered by the applicants indicate that the earnings over the direct routes would range from 21.8 to 31.6 mills a ton-mile, and from 39.2 to 47.4 cents per car-mile based on a single trailer per flatcar, and 78.4 to 94.8 cents per car-mile based on two trailers per flatcar.

While these earnings and the cost data previously discussed show that the rates generally would be reasonably compensatory, in view of the conclusions reached with respect to the justness and reasonableness of these proposed rates, the application will be denied.

I. AND S. DOCKET NO. 6906

By schedules filed to become effective on April 3, 1958, and later, in these proceedings, Pan-Atlantic and the motor common carrier participants in its

tariffs proposed to establish approximately 94 commodity rates for the transportation in sea-land service of numerous commodities,[7] in trailerload, multiple-trailerload, and volume quantities, from, to and between numerous points in the East, South, and Southwest. Upon protest of rail carriers in these areas, the operation of the schedules was suspended to and including November 2, 1958, and later, after which the schedules became effective.

The evidence used in computing costs in the instant proceedings is similar to that submitted in I. and S. Docket No. M-10415. Our cost finding section has considered this evidence and has restated the sea-land costs before us. The rationale of the restatement is substantially the same as that in I. and S. Docket No. M-10415. The conclusion is that the proposed rates equal or exceed the out-of-pocket costs for 85 of the listed 94 movements. Representative proposed rates and restated costs are shown in appendix C hereto.

In the restatement of costs, there are nine listed rates which yield less than the out-of-pocket cost. Pan-Atlantic states that it will seek authority to cancel two of these rates, both applying on petroleum products, from New Orleans to Miami and Melbourne, Fla., under investigation in I. and S. Docket No. 6906. Of the remaining seven rates listed in the restatement as not yielding out-of-pocket costs, two are on paper and bags, one on glass bottles, two on

[7] Sewer pipe, paper and paper bags, petroleum products, clay tile, bottle caps, calcium sulphate, iron oxide, titanium, dioxide toilet preparations, glass bottles, laundry sour, red lead, mortar color, printing paper, synthetic plastics, paper fabric bags, paper boxes, clay n.o.i., rosin, canned goods, petroleum, lumber, oak flooring, roofing, ammunition, beer, drain tile, wallboard, and paraffin wax.

synthetic plastics, and two on beer. The rates on paper and bags are from Advance and Hodge, La., to Miami, in I. and S. Docket No. 6906 (109 cents, minimum 64,000 pounds, utilizing two trailers with 32,000 pounds each; out-of-pocket cost, 111 cents); the rate on glass bottles is from Lancaster, N.Y., to Miami, in I. and S. Docket No. M–11077 (184 cents, minimum 22,000 pounds; out-of-pocket cost, 186 cents); the rates on synthetic plastics are from Buffalo, N.Y., to Dallas and Fort Worth, in I. and S. Docket No. M–11077 (195 cents, minimum 30,000 pounds; out-of-pocket costs, 199 and 201 cents, respectively); and the rates on beer are from Philadelphia to Daytona Beach, Fla., in I. and S. Docket No. M–11259 (99 and 85 cents, minima 30,000 and 40,000 pounds, respectively; out-of-pocket costs, 119 and 106 cents).

Only the sea-land rates of Pan-Atlantic, and not the all-rail boxcar rates, are here under investigation. The rail carriers urge that regardless of whether we approve or disapprove the sea-land rates, there should be no prescription of a relationship between the sea-land and the all-rail rates. The rail carriers indicate that if the instant rates are approved, they may counter with reduced rates of their own.

Based on the costs before us, the sea-land rates here in issue generally, with the exception of the nine rates previously noted, are compensatory. The other listed 85 rates exceed out-of-pocket costs, and about 42 percent of them cover fully distributed costs.

I. AND S. DOCKET NO. M–11375

By schedules filed to become effective on June 9, 1958, and later, the respondents, Pan-Atlantic and the motor-carrier participants in its tariffs, proposed

to establish 65 or more reduced commodity rates for the transportation in sea-land service of numerous commodities,[8] in trailerload, multiple-trailerload, and volume quantities, from and to points in the East, South, and Southwest. Upon protests of rail carriers and others, the operation of the schedules was suspended to and including January 8, 1959, in the title proceeding, and later in some of the embraced proceedings, after which dates the schedules became effective.

The proposed rates, with certain exceptions, reflect differentials, approximating 5 percent to and from interior points and 7 percent to and from the ports, under the overland rates of rail or motor carriers. In no instance is Pan-Atlantic participating in traffic in competition with the rail or motor carriers except at rates differentially under the all-rail or all-motor rates. For example, when in 1958 a differential on canned foodstuffs from Crystal City, Tex., to Swedesboro, N.J., was removed by a reduction in the rail rate, all of the traffic, which had been handled previously by Pan-Atlantic, was diverted to the railroads.

The cost evidence submitted in these proceedings has also been considered by our cost finding section. Appendix D hereto contains examples of the costs of record as restated by that section in accordance with accepted cost-finding principles. The cost evidence shows that none of the sea-land rates in issue are below out-of-pocket cost, and in most instances the rates exceed fully distributed cost.

---

[8] Including copper cable, tires, wallboard, woodenware, chemicals, denatured alcohol, paint, floor covering, aluminum foil, glue, insulating material, synthetic plastics, printed matter, skates, iron or steel bars, petroleum oil, building paper, roofing and roofing material, aluminum articles, aluminum junk, iron or steel castings, and machinery.

In most instances on this traffic, according to the cost data of record, the railroads are the low-cost agency on an out-of-pocket basis, especially where the higher minimum weights are used. For example, on copper cable moving from New Haven, Conn., to Tampa, Fla., when the traffic moves at minimum weights of 30,000 pounds, Pan Atlantic's restated costs are 97 cents per 100 pounds and the rail restated costs are 101 cents, so that Pan-Atlantic's costs are 96 percent of the rail costs. However, when the 60,000-pound minimum is used, Pan-Atlantic's costs remain at 97 cents because of the necessity of using two trailer boxes, while the rail costs decrease to 67 cents, or a ratio of sea-land to rail of 145 percent. No rail fully distributed costs are on this record, nor was any attempt made to show all-motor costs.

During September 1958, the Coast Guard reclassified the dead weight tonnage of the Pan-Atlantic vessels. The tonnage capacity of each vessel was increased by 500 tons, which according to Pan-Atlantic results in a substantial reduction in vessel cost per ton carried. We find that the sea-land rates equal or exceed the out-of-pocket costs for all movements, and are compensatory.

The protestants indicate that if the instant rates are approved, they intend to counter with reduced rates of their own.

SUMMARY AND CONCLUSIONS

The sea-land, Seatrain, and TOFC rates here under investigation, with the few exceptions noted, appear to be compensatory. Many of them are above the fully distributed costs shown, and, with the exceptions mentioned, all are above the out-of-pocket costs. The next, and the most important, question is whether these rates constitute destructive competition.

As related, the sea-land rates of Pan-Atlantic, in general, are lower than the corresponding rail rates, but by lesser amounts than differentials which existed by reason of the rates formerly maintained in connection with Pan-Atlantic's break-bulk service. At the same time, Pan-Atlantic's costs of the sea-land operation are from $10 to $12 a ton less than the cost under its break-bulk service.

Unquestionably, Pan-Atlantic's former break-bulk service was inferior to rail service. While many of the service disadvantages of the former break-bulk operation have been overcome by the sea-land operation, the preponderance of the testimony on these records is to the effect that most of the shippers prefer rail service to sea-land service except at lower rates for the latter. The records show no instance of any traffic moving by sea-land except at rates lower than the rail rates. We must conclude, therefore, that, in order to attract traffic, the sea-land service must establish rates somewhat below those of the rail carriers from and to the same points, and that Seatrain, whose rates and service are comparable to Pan-Atlantic's, is in a like position.

In the prior report in I. and S. Docket No. M-10415 the division concluded that the proposed sea-land rates there under investigation would not be competitively destructive. As explained, the rail carriers do not attack that conclusion in their petition for reconsideration. We agree with the division, and we further conclude that the compensatory sea-land and Seatrain rates under investigation in the other proceedings also are not competitively destructive.

The proposed TOFC rates would be on a parity with the current sea-land rates, and, as indicated, are on the level of the motor common carrier rates, based on the assumption that the TOFC and sea-land

services have many of the characteristics of overland motor service. The motor carriers agree that a differential of sea-land rates under TOFC rates is justified. They are not prepared to suggest what that differential should be.

Pan-Atlantic and Seatrain contend that the proposed TOFC rates are unlawful because they would wipe out existing differentials and place the rail rates on the exact level of the sea-land and Seatrain rates. They insist that they must have rates lower than the rail rates if they are to move any substantial volume of this traffic.

All of Pan-Atlantic's traffic is competitive. On the other hand, Pan-Atlantic argues that the traffic which the railroads seek to retain or obtain in competition with Pan-Atlantic and Seatrain constitutes only a small part of their total traffic in the areas here affected, and that because of the volume of their noncompetitive traffic the railroads could, if permitted to do so, reduce their sea-land competitive rates to an out-of-pocket cost basis and make up most or all of the difference between that level and their fully distributed costs on other traffic.

Pan-Atlantic, if it is to continue in operation, must recover its fully distributed costs on the overall sea-land operations. Thus, if the differentially lower rates which Pan-Atlantic must maintain to attract traffic in competition with the railroads were forced by such competition to be reduced to a point where, in general, they failed to recover operating costs plus a reasonable return, obviously its sea-land operations would become unprofitable and their continuance would be threatened.

Pan-Atlantic insists that under the act, interpreted in the light of the national transportation policy, we are required to prescribe a differential in its favor

in order to preserve its operations as an essential part of the national transportation system. It seeks a minimum differential in its favor of 10 percent under the rail TOFC rates, and concedes that its differential under the rail boxcar rates should be somewhat less. It states that experience has shown, generally speaking, that a 5-percent differential, sea-land under rail boxcar rates, is the minimum that will permit sea-land participation in the traffic.

Seatrain asks that whatever action we may take in prescribing a relation between the sea-land and rail rates, such action be given effect through the medium of a minimum rate order which will preserve the differentials now enjoyed by Seatrain in competition with the railroads.

The restated sea-land costs, both out-of-pocket and fully distributed, are below the restated TOFC costs for all movements on which the proposed TOFC rates would apply, as computed for flatcars with a single trailer, and also for all but 2 of the 66 movements computed for 2 trailers on a TTX car. Comparing the rail boxcar service with sea-land, on some of this traffic, particularly port-to-port traffic and certain other traffic subject to the higher single-trailer minima, Pan-Atlantic is shown as the low-cost agency; on the other traffic, the railroads' costs appear to be lower. No witness hazarded a guess as to the probable division of the TOFC traffic under the proposed rates as between single-trailer and two-trailer movement. The rail costs of transporting TOFC shipments would of course vary considerably depending upon whether a flatcar carrying only one trailer or a TTX car carrying two trailers were used; the choice of the equipment used would rest entirely with the railroads. Also, a shift from one port to another by Pan-Atlantic,

which is frequently required by the peculiarities of the service, can effect a substantial change in the water-carrier costs on any of this traffic. Moreover, we do not have before us the rail costs as to many of these rates; and, as discussed in detail in the prior report, other considerations enter into the factor of inherent advantages. For the foregoing reasons, we cannot determine on these records where the inherent advantages may lie as to any of the rates in issue. We must recognize, also, that cost is only one of the elements which may appropriately be considered in passing upon the lawfulness of rates. In the exceptional circumstances here presented, other considerations, herein discussed, appear to us determinative of the issues.

In dealing with competitive rates, section 15a(3) prohibits us from holding the rates of a carrier to a particular level to protect the traffic of another mode. That prohibition, however, is qualified by the words "giving due consideration to the objectives of the national transportation policy declared in this Act." Clearly, the prohibition does not mean that rates which fail to meet other standards of lawfulness in the act, interpreted in the light of the national transportation policy, must be approved because an effect of their disapproval might be to protect the traffic of a competing mode. It is the declared national transportation policy, among other things, to provide for fair and impartial regulation of all modes of transportation subject to the Interstate Commerce Act, so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service, and foster sound economic conditions in transportation and among the several carriers, all to the end of developing, coordi-

nating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense.

Since the enactment of section 15a(3) in 1958, we have had occasion to apply its provisions in a number of situations where rate reductions motivated by intermode competition were under consideration. We have refused to condemn the compensatory rates of carriers even though they were reduced below the prevailing level of the rates of competing modes, in the absence of a showing of unlawfulness under the act. See *Lumber, California and Oregon to California and Arizona*, 308 I.C.C. 345; *Paint and Related Articles in Official Territory*, 308 I.C.C. 439; *Sugar to Ohio River Crossings*, 308 I.C.C. 167; *Magnesium from Velasco, Tex., to East St. Louis, Ill.*, 309 I.C.C. 659. None of the prior proceedings, however, presented a situation such as that before us here. The reduced rates of the railroads here under consideration are an initial step in an overall program of rate reductions that can fairly be said to threaten the continued operation, and thus the continued existence, of the coastwise water-carrier industry generally.

The record shows that where there were 19 companies with 139 vessels operating in the Atlantic-Gulf coastwise trade prior to World War II, today only 2 deepwater common carriers are operating in that trade with 7 vessels, 3 by Pan-Atlantic and 4 by Seatrain. And where approximately 8.5 million tons annually were transported in the Atlantic-Gulf coastwise trade prior to the war, the present capacity of the remaining vessels in that trade is only 1.8 million tons. In 1959, Pan-Atlantic's total tonnage, coastwise

and Puerto Rican trades, approximated 600,000 tons, as compared with over 1,000,000 tons coastwise alone in 1941. At the outset of World War II, all of the vessels employed in the deepwater coastwise trade were taken over by the Federal Government for national defense.

The importance of coastwise shipping for national defense purposes has been emphasized repeatedly from various governmental sources. Thus, the United States Maritime Administration in "A Review of the Coastwise and Intercoastal Shipping Trades," published in December 1955, stated, in part:

> In short the crux of the coastwise-intercoastal shipping problem is in the break-bulk dry-cargo trade today as it was before the war. The reestablishment and preservation of this segment of the domestic fleet is of vital national defense importance if the immediate needs of a future grave national emergency are to be met. It is obvious that the ready availability of ships employed in domestic operations may well be a critical factor in any initial military or civil defense operation of the United States occasioned by a future atomic or thermonuclear war.
>
> Further, an economically sound, low-cost domestic fleet will continue to make important contributions to the economic growth and development of the United States as a whole and a balanced national transportation system in particular.

In a report on domestic water carriers by the Committee on Interstate and Foreign Commerce of the Senate, entitled "1950 Merchant Marine Study and Investigation," made pursuant to Senate Resolution

50, Report 2494, 81st Congress, 2d session,[9] that Committee said, at page 17:

> One fact stands out, and that is the essentiality of coastal water service to shippers the country over. * * *
>
> Finally, of course, is the importance to national defense of having domestic tonnage readily available in an emergency. This fact must not be overlooked in discussing the importance of this segment of the merchant marine in terms of national policy.

As indicated in the next preceding quotation, coastwise shipping is important also for general public use as an integral part of the national transportation system. The following taken from *War Shipping Administration T. A. Application*, 260 I.C.C. 589, 591 (1945), is true today:

> The dependency of ports and coastal areas upon the existence of water transportation is well known. The economy of such areas, to a large extent, is founded upon the availability of such transportation, without which a large part of their economy would not have been developed, and with the discontinuance of which a large part of their normal economic activity will cease to exist.

Section 307(f) of the act provides that in prescribing just and reasonable rates by water, we shall give due consideration, among other factors, to the effect of the rates upon the movement of traffic by the carrier or carriers for which the rates are prescribed; to the need, in the public interest, of adequate and efficient

[9] Quoted by the Merchant Marine and Fisheries Subcommitee of the Senate Committee on Interstate and Foreign Commerce in its report, dated August 29, 1960, on the "Decline of the Coastwise and Intercoastal Shipping Industry," 86th Congress, 2d session.

water transportation service at the lowest cost consistent with the furnishing of such service; and to the need of revenues sufficient to enable water carriers, under honest, economical, and efficient management, to provide such service. The provisions of this paragraph are similar to those in sections 15a(2) and 216 (i). Also, section 305(e) provides that "Differences in the * * * rates * * * and practices of a water carrier in respect of water transportation from those in effect by a rail carrier in respect to rail transportation shall not be deemed to constitute * * * an unfair or destructive competitive practice."

Section 307(d), in authorizing the Commission to establish through routes and joint rates in connection with water and rail carriers, provides that "where one of the carriers is a common carrier by water, the Commission shall prescribe such reasonable differentials as it may find to be justified between all-rail rates and the joint rates in connection with such common carrier by water." While this provision is not controlling here, where the rates by water under investigation were voluntarily established, and most of them apply in connection with a water carrier and motor carriers, nevertheless, considered with the other provisions of the act above mentioned, it appears indicative of the congressional intent that, where necessary to permit an essential, efficiently operated water carrier to participate in the economical movement of traffic, the service in connection with the water carrier should be accorded some advantage in the form of lower rates. This is so not only on traffic between the ports, but also to and from interior points, for coastwise carriers cannot survive on port-to-port traf-

fic alone. As stated in *Deming Rates from Eastern Ports to the Southwest*, 264 I.C.C. 551, 559:

> The steamship lines plying between north Atlantic and Gulf ports must, in order to operate successfully, participate in the handling of traffic to and from interior points. In order to participate in such traffic, the rates over such lines must be on a lower level than those over all-rail routes.

There is no contention that the coastwise lines here before us are not efficiently operated. Shipper evidence on these records is indicative of a need by the general public for the services of those lines, and that they represent an important and essential part of a national transportation system adequate to meet the needs of the commerce of the United States and of the national defense. There is, of course, a limit beyond which these carriers cannot be expected to attract traffic from interior points at economical rates. We are satisfied that their rates here under investigation, except as noted in the findings herein, do not go beyond that limit.

In the circumstances presented here, we are of the opinion that the objectives of the national transportation policy require the establishment and maintenance of a differential relationship between the rates under investigation on sea-land and Seatrain service, on the one hand, and the rates of the rail carriers, on the other, which will allow these water carriers operating in the coastwise trade to maintain rates that will enable them to continue efficient and economical coastwise service.

It appears to us, however, that the 10-percent differential sought by Pan-Atlantic would be excessive. The differences between the sea-land and the all-rail services are not so marked as to require that wide a

rate difference. In our judgment, the rail TOFC rates on the commodities from and to the points concerned in I. and S. Docket No. 6834 should be maintained on a level no lower than 6 percent above Pan-Atlantic's sea-land rates, so long as the latter are not increased above their present levels. While the matter of an appropriate differential for sea-land service or Seatrain service under rail boxcar service is not here directly in issue, it may be helpful for the future guidance of the parties to express our view that, as boxcar service is inferior to TOFC service, the differential under the boxcar rates should be somewhat less than 6 percent.

Upon reconsideration, in I. and S. Docket No. M-10415 and the proceedings embraced therein we affirm the prior findings that 11 of the rates under investigation on the commodities from and to the points shown in footnote 4 of this report are not shown to be just and reasonable, and that the other rates under investigation are lawful.

In I. and S. Dockets Nos. 6906 and M-11375, and proceedings embraced therein, we find that nine of the rates under investigation, on the commodities from and to the points shown in the footnote,[10] are noncompensatory and thus are not shown to be just and reasonable, and that the other rates under investigation are lawful.

In No. 32313, we find that the sea-land rate of 216 cents, minimum 20,000 pounds, on paint and paint materials from Baltimore to Dallas and Fort Worth,

[10] Paper and paper bags from Hodge and Advance, La., to Miami, Fla.; petroleum products from New Orleans, La., to Melbourne and Miami, Fla.; glass bottles from Lancaster, N.Y., to Miami; synthetic plastics from Buffalo, N.Y., to Dallas and Fort Worth, Tex.; and beer from Philadelphia, Pa., to Daytona Beach, Fla.

is unjust and unreasonable, and that the other sea-land rates and the Seatrain rates under investigation are lawful.

In I. and S. Docket No. 6834, we find that the proposed reduced TOFC rates are not shown to be just and reasonable, and the proposed schedules will be required to be canceled, without prejudice to the filing of new schedules in conformity with the conclusions herein. Since these proposed rates are not shown to be just and reasonable, the fourth-section application for relief to establish such rates will be denied.

Appropriate orders will be entered.

COMMISSIONER HUTCHINSON, concurring:

I am in general agreement with the majority report.

In I. and S. Docket No. 6834, the majority concludes that on a fully distributed basis, sea-land is a lower cost service than TOFC. Thus the ultimate effect of approval of the schedules would be to allow rates of the high-cost carrier to gravitate to a level whereby the low-cost carrier will be forced to go below its full costs in order to participate in the traffic.

A regulated competitive mode of transport maintaining rates not in excess of maximum reasonableness should not publish reductions resulting in revenue losses, for the sole purpose of obtaining traffic being handled by another mode. Such proposals constitute, in my opinion, destructive competitive practices which the national transportation policy condemns.

I am not convinced, however, that a differential of 6 percent is warranted on this record, but since I do not believe the "without prejudice" finding constitutes an effective prescription of a differential, I concur in the majority decision.

COMMISSIONER MCPHERSON, concurring in part:

I would approve all the rates which are compensatory, but on this record I would not impose any differential.

COMMISSIONER FREAS, whom CHAIRMAN WINCHELL and COMMISSIONER WEBB join, dissenting in part:

My views concerning the issues presented in I. and S. Docket No. M-10415 have been set forth in a separate expression to the prior report of division 3 in this proceeding, 309 I.C.C. 587, 606. The same reasoning is in general applicable to the other proceedings embraced herein. I shall therefore confine my remarks to the additional points raised by the parties and by the majority in its Summary and Conclusions.

With one possible exception, neither respondents nor protestants appear to dispute the basic concepts set forth in my prior expression, particularly those dealing with the guiding principles to be followed in competitive ratemaking. The railroads do contend that these principles go too far and overlook a tremendous impetus which they would give to private carriage. Apparently the railroads believe that the effect of those principles would be to require the return of fully distributed costs in every instance. That anyone should place such a construction upon my prior expression was wholly unexpected. The views expressed dealt with the situation at hand which is limited to intermode competition between regulated carriers. The standards set forth in no way preclude action necessitated by either the existence or the threat of exempt transportation.

Pan-Atlantic merely asserts that my suggestion as to cancellation and refiling of rates in conformity with the guiding principles would not be "practicable" here. It contends that because of the strong conflict between the parties concerning the relative values or advantages of the respective services to the shipping public unavoidable litigation would in most instances follow such refiling. This contention is not directed to the principles involved but to the evidentiary facts. The determination of these factual issues would be relatively simple were it not for the broad scope of the proceedings here, which involve hundreds of different commodity rates. The burden of proof is on respondents; in the absence of a clear showing of representativeness, orderly regulatory processes preclude the approval of differentials in all instances upon justification only of some.

In support of its conclusion that rate differentials, rail over water, are warranted here, the majority appears to rely heavily upon the national transportation policy. It is said that the differentials are necessary in order to allow the coastwise lines to continue their essential service. Specifically the majority stated: "Shipper evidence on these records is indicative of a need by the general public for the services of those lines, and that they represent an important and essential part of a national transportation system adequate to meet the needs of the commerce of the United States and of the national defense." However, all that the record indicates in this regard is that although in certain instances shippers may consider the advantages or disadvantages of the respective

services offered, the controlling factor in choosing between the involved modes of carriage is generally the level of the rates. There is no evidence here that either the commerce of the United States or the national defense would be hampered unless the water carriers, though not shown to have the inherent advantage in many instances, are given an artificial rate advantage. A reiteration of some of the language contained in the national transportation policy is in and of itself no substitute for essential supporting evidence. See *Pacific Inland Tariff Bureau* v. *United States*, 129 F. Supp. 472. Nor are there any subsidiary findings in the report to substantiate any of the specific differentials proposed by the water carriers or suggested by the majority.

The decision of the majority may well be taken to stand for the proposition that water carriers are ordinarily entitled to rate differentials regardless of the circumstances of the specific case. I do not read the statute to require as a matter of law, or even to permit, blanket protection from reasonable competition for the water carriers, or for that matter for any mode of transportation. Indeed, even the water carriers have not gone this far in their construction but have, in the last Congress, sought legislation to that effect.

Appendix B

Rationale of cost finding section

Cost evidence:

Cost evidence relating to the trailer-on-flatcar service was introduced by the southwestern rail carriers, eastern rail carriers, and by the protestant, Pan-Atlantic Steamship Company. The eastern rail carriers introduced a cost study for TOFC service based almost wholly on cost factors introduced by the southwestern rail carriers. Since the cost evidence of the southwestern rail carriers will be discussed in detail below, further comments on the eastern rail carriers' cost evidence is considered unnecessary.

The Missouri Pacific Railroad Company introduced revenue and expense data intended to show that the proposed TOFC rates would produce compensative revenue when compared with the average revenue and operating expenses of carriers in the central, western, and southwestern regions. The revenues and expenses were shown on a per ton-mile and a per car-mile basis for all traffic combined. In addition to not providing a separation of the expenses between terminal and line-haul and between out-of-pocket and fully distributed, these figures do not reflect the special characteristics of TOFC traffic, and, therefore, are without probative value in measuring the compensatory nature of the proposed rates.

The southwestern rail carriers originally presented cost data for the TOFC service with costs based on handling one trailer per flatcar, two trailers per flatcar, and with percentages of empty return of zero, 50, and 100 percent. Subsequently additional evidence was introduced which superseded the original presentation. This latter evidence was based on costs for the year 1956 from Statement No. 2–58 of the Bureau of Accounts, Cost Finding and Valuation, and ad-

justed by respondent to a level of May 1, 1958. It compares out-of-pocket costs with the proposed rates for one trailer per car, for two trailers per car, and on a combined basis reflecting 75 percent two trailers per car and 25 percent one trailer per car. The empty return ratio used for the line-haul expense was 25 percent. The respondent considered the combined showing to be the most appropriate, although it conceded that such a performance was not presently attained. Based on respondent's cost presentation the proposed rates exceed out-of-pocket costs for all movements.

The protestant water carrier took many exceptions to respondent's cost presentation and restated the costs. A comparison of the proposed rates with the protestant's restated out-of-pocket costs showed most of the rates to be below out-of-pocket cost.

In order to more fully understand the cost elements involved herein a short description of the services rendered the TOFC traffic may be helpful. At point of origin the trailer is loaded at the shipper's dock and then moved to the ramp area of the originating railroad. The trailer is subsequently loaded onto the flatcar and is tied down or made secure to the car. Upon completion of the loading the cars are switched from the ramp to the outbound train along with other types of cars. The train is then given a line-haul movement to the western gateway where the TOFC cars are switched to the delivering railroad's ramp, and the trailers are untied and removed therefrom. At the present time the TOFC cars are not interchanged between the railroads so that direct movement of the trailers is required for delivery to the connecting line. After delivery to the connecting carrier's ramp the trailers are again placed on flatcars and tied down and subsequently

moved to final destinations, where the cars are again switched to a ramp, the trailers untied and removed, delivered to the consignee and unloaded, and returned to the railroad terminal. So far as these proceedings are concerned two types of cars are involved: one is a flatcar of single trailer capacity which is equipped with tiedown devices; and the other is a car especially designed to hold two trailers with special holddown devices. The latter type of car is at present not owned by the railroads but is leased from a car company under mileage agreement and is referred to as a trailer-train car. The abbreviation of TTX will be used herein in referring to the two-trailer cars while the single-trailer cars will be referred to as R.R.-owned cars.

In view of the many points of controversy over the cost evidence in these proceedings, each element of cost will be discussed individually below with the comments and evaluation by the cost finding section immediately following each item.

(1) Source and level of expense data:

RESPONDENT

In its final cost presentation respondent based its rail costs on unit expenses shown in Statement No. 2-58 of the Bureau of Accounts, Cost Finding and Valuation, which showed costs for the year 1956 and also costs adjusted to a level of January 1, 1958. Respondent considered the costs as of January 1, 1958, to be overstated, and therefore used the 1956 costs adjusted to what it purported to be a May 1, 1958, level. This was accomplished as follows: The total operating expenses for the year 1957 were related to the total operating expenses for the year 1956 for the eastern district and western district separately. The percentage of increase was found to be

1.57 percent for the eastern district and 0.83 percent for the western district. A cost-of-living adjustment of 4 cents per hour as of May 1, 1958, was applied to the total service hours for the year 1957, United States as a whole, and the resulting amount of increase was related to the total operating expenses for the year 1956 for the United States as a whole to produce an additional adjustment of 1.14 percent. The latter amount was added to the previous percentage increases for the eastern and western districts to produce total adjusting percentages of 2.71 percent for the eastern district and 1.97 percent for the western district. These percentage adjustments were applied to the expenses for 1956 by respondent to produce costs as of May 1, 1958.

Respondent showed costs on an out-of-pocket level only. It contends that the amount of additional revenue which a commodity should produce above out-of-pocket cost should be contingent upon what the traffic can bear rather than on an arbitrary prorate based on averages of all traffic. Therefore, it did not show fully distributed expense.

PROTESTANT

In its restatement of the rail costs in respondent's exhibit No. 3 protestant used the costs for the year 1955 shown in Statement No. 1–57, issued by the Bureau of Accounts, Cost Finding and Valuation, and underlying working papers thereto. These costs were adjusted for wage and price levels to January 1, 1958, based on data shown by rail carriers in Ex Parte No. 212.

Protestant showed its costs both on an out-of-pocket and fully distributed basis. The out-of-pocket costs include 80 percent of the operating expenses,

rents, and taxes, excluding Federal income taxes, plus a return of 4 percent after Federal income taxes, and 50 percent of the road property and 100 percent of the equipment. The fully distributed costs include, in addition to the out-of-pocket costs, the remaining 20 percent of the operating expenses, rents, and taxes, the passenger train and less-than-carload operating deficits and return of 4 percent after Federal income taxes on the property as a whole. The revenue needs over and above the out-of-pocket costs are given a prorate ton and ton-mile distribution over all revenue traffic without distinction as to kind or class.

COST FINDING SECTION'S COMMENTS

The method used by respondent to adjust the 1956 expenses to a May 1, 1958, level completely ignores the amount of traffic moving in the respective years because only the total operating expenses and a cost-of-living adjustment are used to obtain the final adjusting factors. Respondent's method of adjustment is unacceptable.

The method of adjustment to a level of January 1, 1958, used by protestant assumes the same level of traffic for both periods but adjusts for the level of wages and prices. When the adjustment is made in this manner for only a 1-year period there is small likelihood of error. However, when such adjustment is made for 2 years or more there is a possibility of overstatement since any increase in efficiency of operations is ignored.

In view of the fact that the sea-land costs reflect 1957 expenses and the TOFC pickup and delivery, tiedown cost and trailer rental expenses are based generally on the year 1957, the remaining TOFC expenses should also reflect a level for the year 1957.

Accordingly the cost finding section believes that the costs shown in its Statement No. 2–58, which are based on the year 1956 operations with adjustment to reflect wage and price levels as of January 1, 1958, are appropriate for use herein and these costs have been used in the restatement of respondent's and protestant's cost evidence. (A check of the costs shown in cost finding section's Statement No. 5–58, which shows costs based on expenses for the year 1957, indicates very close agreement between those costs and the costs as of January 1, 1958, shown in Statement No. 2–58. The costs in Statement No. 5–58 would have been used in the cost finding section's restatement except for the fact that this statement is not of record.) The out-of-pocket cost is the significant measure as to whether or not a rate is compensatory, but for comparative purposes we have also supplied the fully distributed costs in our restatement.

(2) Switching at origin and destination:

RESPONDENT

For the cost of switching at the TOFC ramps, respondent used one-third of the territorial average switching time. The factor of one-third was based on data furnished by the Pennsylvania Railroad Company and the Baltimore and Ohio Railroad Company in the East, and the Texas and New Orleans Railroad Company, Texas and Pacific Railway Company, St. Louis Southwestern Railway Company, and Missouri Pacific Railroad Company in the Southwest. In computing the switching expense per car respondent included an allowance of 25 percent for switching empty cars.

PROTESTANT

Protestant contended that the data supplied to respondent by the various railroads were deficient in that they did not make allowance for switching of the empty car or for nonproductive time of the yard locomotives. Protestant stated that the switching data used by respondent was, in some instances, based on estimates, and it contends that a detailed study should have been made to determine the switching time of the TOFC traffic. The protestant restated the switching minutes to include an allowance for switching of empty cars equal to the number of loaded cars and for nonproductive time. In the eastern district, protestant's restated figure amounted to 12.9 minutes per car which, when related to the territorial average of 30 minutes per car, produced a ratio of 43 percent. Protestant used 45 percent of the territorial average in its restatement. In the western district, protestant used a restated figure of 16.4 minutes per car which, when compared with the total average of 26 minutes per car, produced a ratio of 63 percent. Protestant used a ratio of 65 percent in its restatement.

COST FINDING SECTION'S COMMENTS

We believe that respondent should have made detailed switching studies to determine the switching minutes per car for the TOFC traffic. In its restatement of respondent's switching minutes for the eastern district, the protestant used only the minutes for the Pennsylvania Railroad Company at Kearney, New Jersey, Pittsburgh, and Philadelphia, and for the Baltimore & Ohio at Philadelphia. It ignored the time at St. Louis of 2.1 minutes per car submitted by the Pennsylvania in a letter to protestant under date of March 25, 1958, which is part of the working papers that parties agreed could be used. When this

time is taken into account and adjusted for empty and nonproductive time, the average switching minutes in the eastern district is reduced from 12.9 minutes to 11.4 minutes. The cost finding section does not agree with protestant's use of 100-percent allowance for empty switch which is normal for other than boxcar traffic. Once the loaded TOFC cars have been placed in the ramp there is no need to switch them away from the ramp until they are to be made up into a returning train except in those instances where the capacity of the ramp is limited to less than the total number of cars received. Except for reference to the four-car capacity of the Baltimore & Ohio TOFC ramp at Philadelphia, the record does not provide evidence as to this necessity and, in the absence thereof, the cost finding section believes that an allowance for switching empty cars equal to the amount of empty movement that is present in the line-haul operation is appropriate. Therefore, we have adjusted protestant's switching minutes to reflect 25 percent empty switching in the Eastern district and 50 percent empty switching in the western district. The use of these empty return ratios is discussed in a subsequent item. The adjusted switching minutes per car compute to 7.13 minutes in the East and 12.30 minutes in the West. When related to the territorial average minutes per car of 30.6 in the East and 26.7 in the West shown in statement No. 2–58, the ratio of TOFC switching minutes to the territorial average becomes 23 percent for the East and 46 percent for the West.

(3) Freight-train car costs:

RESPONDENT

Respondent used a ratio of 45 percent of the territorial average for the freight-train car costs of rail-

road-owned cars. This was based on an average detention at origin and destination combined of 1.7 days as compared to the territorial average of 3.75 days. Respondent made no distinction between railroad-owned cars and privately owned cars.

PROTESTANT

Protestant also used a ratio of 45 percent of the territorial average for railroad-owned cars. The protestant developed the rental expense per car-mile for the TTX cars separately and the freight-train car costs for these cars is reflected in the line-haul expense.

COST FINDING SECTION'S COMMENTS

In its restatement of the costs the cost finding section has used 45 percent of the territorial average for the TOFC freight-train costs for railroad-owned cars and has used protestant's treatment for the TTX cars.

(4) Carload station clerical expense:

RESPONDENT

Respondent included carload station clerical expense based on 50 percent of the territorial average for the East and for the West.

PROTESTANT

Protestant included this expense in total for each territory.

COST FINDING SECTION'S COMMENTS

In view of the fact that the TOFC traffic is interchanged between the eastern district and the western district and would move on through billing respond-

ent's treatment is proper and has been followed in the cost finding section's restatement.

(5) Loss and damage expense:

RESPONDENT

Respondent included the territorial loss and damage clerical expense and the loss and damage claim payments based on the United States average for all other manufacturers and miscellaneous articles and for alcoholic beverages or liquor separately.

PROTESTANT

Protestant also included loss and damage clerical expense and loss and damage claim payments except that protestant included the loss and damage claim payments for each territory rather than once for the entire movement.

COST FINDING SECTION'S COMMENTS

In obtaining the loss and damage clerical expense from the carload unit cost sheets protestant used the expense per ton shown therein for an expense per hundredweight. Protestant's expenses of 0.599 cent for the eastern district and 1.472 cents for the western district should have been 0.030 cent and 0.074 cent, respectively. The loss and damage claim payments should have been included only once for the entire movement since these figures are based on United States averages without regard to length of haul. The loss and damage clerical expense and the loss and damage claim payments have been included correctly in our restatement.

(6) Interchange expense:

RESPONDENT

The costs from Statement No. 2–58 include interchange expense in the line-haul expense based on a cost per car-mile. The statement provides for eliminating the interchange expense per car-mile and stating it on a per interchange basis where such treatment is desired. Respondent has availed itself of this option and has included interchange expense based on 1.5 interchanges per loaded move in the East and 0.5 interchange in the West, subsequently increased for the empty movement. Over-the-street trailer interchange cost at the gateway point between eastern and western territories is included separately. Respondent contends that interchanges between certain carriers do not entail the switching and cost normally associated with interchange service and that they are merely paper transactions for division of revenue purposes. This would be true for interchanges between the Missouri Pacific and the Texas and Pacific, the Atchison, Topeka and Santa Fe Railway Company and the Gulf, Colorado and Santa Fe Railway Company and the Kansas City Southern Railroad Company and Louisiana & Arkansas Railway Company, and would also be true of certain interchanges in the East. Respondent stated that in the western district it could not foresee any interchanges other than the so-called paper interchanges of TOFC traffic destined to Dallas or Fort Worth as between the western district carriers, since the carriers named above provide direct routes between the gateways and Dallas and Fort Worth.

Rates, costs, and cost ratios

Commodity	Sea-land						Trailer-on-flatcar								Ratios[a]			
			Costs		Ratio, rate to costs				Costs				Ratio, rate to costs				SL to TOFC costs			
	Min.	Rate	OP	FD	OP	FD	Min.	Rate	OP		FD		OP		FD		OP		FD	
									RR	TTX	RR	TTX	RR	TTX	RR	TTX	RR	TTX	RR	TTX
Ammunition, from New Haven, Conn	30	299	138	175	217	171	30	299	214	186	259	231	140	161	115	129	64	74	68	76
Candy or confectionery from Boston, Mass	36	214	139	179	154	120	36	214	190	172	236	218	113	124	91	98	73	81	76	82
Paint and paint material from Jersey City, N.J	36	190	111	137	171	139	36	190	182	166	225	209	104	114	84	91	61	67	61	66
Printed matter from Philadelphia, Pa	23	273	172	212	159	129	23	273	250	204	292	246	109	134	93	111	69	84	73	86
Wire goods, aluminum from York, Pa	14	438	281	334	156	131	30	438	345	246	386	287	127	178	113	153	81	114	87	116

SL is sea-land; TOFC is trailer-on-flatcar; TOFC rates are proposed; Min. is minimum weight in 1,000 pounds; ratios are in percents; OP is out-of-pocket; FD is fully distributed; RR signifies railroad-owned flatcars with a capacity of one trailer; TTX signifies leased flatcars with a capacity of two trailers; destination of shipments is Dallas-Fort Worth.

PROTESTANT

Protestant takes exception to respondent's reduction of the number of interchanges. It contends that even though complete switching service may not be required for those points referred to as paper interchanges there is still some cost associated with such service which should be included. In developing the line-haul cost, the protestant has used both a shortest route and a longest route over actual rail lines and has included the expense for the actual number of interchanges required over each, including so-called paper interchanges.

COST FINDING SECTION'S COMMENTS

Respondent is correct in its contention that the cost for a paper interchange is considerably less than the cost for an interchange where normal switching is involved. However, the elimination of the entire cost for the paper interchanges is not considered proper, considering the fact that the interchange costs in Statement No. 2–58 are based on all types of interchanges as reported by the carriers. Thus, if the cost for paper interchanges were to be excluded the remaining interchange cost would have to be based on the expense per actual interchange which would be somewhat higher than the cost shown in Statement No. 2–58.

Protestant is wrong in including an interchange expense for the transfer of cars between the Atchison, Topeka & Santa Fe and the Gulf, Colorado & Santa Fe railroads. Because these two roads operate and report as a system, the transfer of cars between them is not reported as an interchange. The expense for the transfer is reflected as intertrain or intratrain switching which protestant has included fully on a car-mile basis.

In its restatement the cost finding section has included the average interchange costs expressed on a car-mile basis with the line-haul expenses. Since the interchange at the gateways between the East and West is performed by interchange of the trailer only and not of the rail car, a reduction equivalent to one-half the cost of a full interchange has been applied to the terminal costs in each territory. The effect of this treatment is to include roughly 0.6 interchange for a 900-mile haul in the West and from 1.8 to 2.6 interchanges for hauls of 900 to 1,200 miles, respectively, in the East.

(7) Intertrain and intratrain switching:

RESPONDENT

Respondent included intertrain and intratrain switching on a per car-mile basis but included only 50 percent of the total shown in Statement No. 2–58. The use of 50 percent of the territorial average was not based on any special studies made by respondent but was based on respondent's belief that the trains in which the TOFC traffic moves are subject to less than average switching en route.

PROTESTANT

Protestant included the intertrain and intratrain switching expense on the territorial average basis without reduction.

COST FINDING SECTION'S COMMENTS

In view of the fact that respondent failed to introduce evidence showing that the TOFC traffic actually receives less than the average intertrain and intratrain switching, the use of the territorial average expense for this service is considered to be proper and

has been included in the cost finding section's restatement.

(8) Trailer rental expense:

RESPONDENT

Respondent based its cost for trailer rental on an average charge of $4 per day for a 1-day period of 6.7 days (round trip 13.4 days) plus an allowance for 25 percent empty return. This amounted to a total cost of $33.50 per loaded trailer.

PROTESTANT

The protestant stated that the elapsed time used by respondent did not take into consideration the fact that trailers may be idle over the weekend, and that there might not be 100-percent utilization of the trailers; therefore, it based its cost on a 14-day round trip or 7 days one way plus an allowance for empty return. Based on a rental cost of $4 per day this produced a cost of $44.80.

COST FINDING SECTION'S COMMENTS

Testimony of record indicates that the running time between origin and destination would average 5 days, or 10 days for the round trip. An allowance of 2 days' time at the origin and at destination would appear to be reasonable. Therefore, in its restatement the cost finding section has used an allowance for trailer rental cost based on a 14-day round trip adjusted for empty return instead of a 13.4-day round trip by respondent. The trailer rental cost thus computed amounts to $38.50 per loaded trailer. The allowance for empty return for trailer rental amounting to 37.5 percent is the average of 25 percent empty return in the East and 50 percent in the West. These percentages are discussed subsequently.

(9) Trailer interchange expense:

RESPONDENT

Respondent based its costs for the over-the-street interchange of the trailer at the gateway between East and West on figures furnished by the Baltimore & Ohio and the Pennsylvania, the average of which computed to $5.25 per hour. Allowing 1 hour for the interchange and adjusting for 25 percent empty return, respondent computed a total of $6.56 per loaded trailer for the interchange.

PROTESTANT

Protestant based its expense on figures furnished by the Pennsylvania, the Missouri Pacific and the Baltimore & Ohio and included allowance for 100 percent empty movement. A figure of $24.90 was included for the Baltimore & Ohio, which combined with the amount of $11.28 for the Pennsylvania and $15.76 for the Missouri Pacific, produced an average of $17.31 per loaded trailer.

COST FINDING SECTION'S COMMENTS

The figure of $12.45, excluding allowance for empty, as used by protestant for trailer interchange for the Baltimore & Ohio, appears to be excessive when compared with respondent's figure of $4.85. The record does not provide information as to this discrepancy, therefore, the cost finding section has used respondent's figure of $4.85 in its restatement. Protestant showed a figure of $7.88 for the Missouri Pacific based on 1.5 hours at a cost of $5.25 per hour. This latter figure has been included with respondent's figure to produce an average of $6.12. When the latter amount is adjusted for an empty return amounting to 50

percent, a total cost of $9.18 per trailer interchange is obtained. The latter figure is used in the cost finding section's restatement.

(10) Trailer tiedown and untie cost:

RESPONDENT

Respondent used a basic cost for placing the trailers on the car and securing them and for releasing them and removing them from the cars of $9 per trailer in the East and $8 per trailer in the West. These figures were subsequently adjusted for 25 percent empty return giving total costs of $11.25 per trailer in the East and $10 per trailer in the West.

PROTESTANT

After adjusting the figures furnished to respondent by the various railroads for a clerical cost item protestant used figures of $9.60 per trailer in the East and $8.50 in the West for the trailer train cars, and $24.84 in the East and $8.50 in the western district for railroad-owned cars.

COST FINDING SECTION'S COMMENTS

It was brought out in the record that the figures used by the protestant for tie-down costs in the eastern district were based on figures furnished by the Baltimore and Ohio which included not only the service at the ramp but the movement of the trailers between the ramp and shipper or consignee. In order to correct for this overstatement by protestant the cost finding section has substituted the cost of $9.60 as used by protestant for trailer train cars for the $24.84 it showed for railroad-owned cars in the eastern district. In the western district the cost

finding section has used protestant's figure of $8.50 for both railroad-owned and TTX cars. After adjustment for the respective empty return allowances the total cost per trailer becomes $12.00 in the East and $12.75 in the West.

(11) Pickup and delivery expenses:

RESPONDENT

The pickup and delivery costs include the movement of the empty trailer from the carrier's motor terminal to the shipper's dock, the loading of the trailer and the return of the loaded trailer to the ramp at the origin point, and the movement of the loaded trailer from the ramp at destination to the consignee's dock, unloading, and the return of the empty trailer to the ramp or to the carrier's motor terminal. Based on data furnished by the participating railroads respondent developed costs of $9 per load in the East and $6.90 per load in the West for the movement of trailers between the ramps and shipper's and consignee's docks. The loading and unloading expense used by respondent was 12.8 cents per hundredweight in the East and 11.3 cents per hundredweight in the West.

COST FINDING SECTION'S COMMENTS

The protestant used the respondent's figures in its cost presentation and the cost finding section has done likewise in its restatement.

(12) Weight of train for TOFC traffic:

RESPONDENT

Respondent based its line-haul costs on those for through trains without adjustment for any reduction in the weight of the train for expedited service. Re-

spondent contends that the TOFC traffic is generally handled in regularly scheduled through trains and thus should reflect the cost of through train operations.

PROTESTANT

Protestant computed its line-haul cost of the TOFC traffic based on through train costs but with the weight of the train reduced by 25 percent. Protestant contends that the TOFC traffic moves in manifest trains and receives expedited service, and that such manifest trains normally operate with tonnage ratings which are from one-third to one-fourth less than other through trains because of the speed at which these trains are operated. It also cited movement by the Pennsylvania Railroad of the TOFC traffic from New York to Philadelphia with only 10 or 12 cars in a train. It also stated that the Baltimore and Ohio trains in which the TOFC traffic is handled have tonnage ratings that have 25 percent to 30 percent less traffic than other through trains. The effect of protestant's treatment is to increase the gross-ton-mile portion of the line-haul expense by roughly 5 percent in the Eastern district and by 3 percent in the Western district.

COST FINDING SECTION'S COMMENTS

Although it may be true that the TOFC traffic may receive expedited service in less than average weight trains in some instances protestant has not shown this to be true generally. With regard to the movement by the Pennsylvania of the TOFC traffic between New York and Philadelphia in small trains this movement comprises only a small part of the total movement from eastern points to the southwest, and it cannot be assumed that because such movement

occurs over a short distance the same would be true for the remainder of the haul. In addition, the effect of protestant's adjustment on the total line-haul expense is negligible. In the absence of special studies which would show the actual average weights of trains in which the TOFC traffic is handled, the cost finding section believes that the use of the through train average cost is proper and this has been used in its restatement.

(13) Tare weight of cars and trailers:

RESPONDENT

Respondent made no adjustment in its costs for the difference in tare weights of the cars used for TOFC service from the tare weight of ordinary flatcars. Also, it made no adjustment for the difference in weight for flatcars of two-trailer capacity from those of one-trailer capacity. In addition, it failed to include the tare weight of trailers in computing its expenses. It also failed to distinguish between railroad-owned cars and cars rented on a mileage basis.

PROTESTANT

Protestant developed its costs for railroad-owned cars and for those cars rented on a mileage basis (TTX cars) separately. Based on figures furnished by several railroads concerned with the TOFC traffic it determined that the tare weight for railroad-owned cars was 55,200 pounds before addition of the tare weight of the trailer. After addition of the 11,500 pounds average tare weight of a trailer the total tare weight of the railroad-owned car becomes 66,700 pounds. For the TTX cars it determined the average weight to be approximately 78,000 pounds before addition of the trailer tare weight. Based on in-

formation furnished by the railroads, protestant determined that in the eastern district the TTX cars were loaded with an average of 1.7 trailers per car and in the western district the TTX cars are operated with an average of 1.45 trailers per car. The total tare weight of the TTX cars and trailers computes to 97,550 pounds in the eastern district and 94,675 pounds in the western district.

COST FINDING SECTION'S COMMENTS

The respondent is in error in not recognizing the difference in tare weights between the type of cars and in not making allowance for the additional tare weight of the trailers. The use by protestant of the average number of trailers per car for the TTX cars is also considered to be proper because this reflects the average utilization of the cars. The cost finding section has used protestant's tare weights in its restatement except for a reduction of 800 pounds in the tare weight of TTX cars based on information in the working papers. It has used average number of trailers in the East of 1.7 trailers per TTX car and 1.5 trailers per TTX car in the western district in its restatement.

(14) Net load per TTX car:

RESPONDENT

Respondent assumed a net load for cars carrying two trailers of twice the minimum weight per shipment.

PROTESTANT

The protestant developed the net load for TTX cars by adding to the minimum weight per shipment an amount equal to 0.7 of an average weight per shipment taken as 30,000 pounds in the East and 0.45 of

30,000 pounds in the western district. The figures of 0.7 and 0.45 are derived from the average number of loaded trailers handled on TTX cars as described in item 13 above.

COST FINDING SECTION'S COMMENTS

The use of twice the minimum weight by respondent is incorrect since it overlooks the fact that a trailer of one minimum weight may be handled with a trailer carrying an entirely different load on the same flatcar and also ignores the fact that the average utilization of the TTX cars appears to be less than the maximum possible of two trailers per car. The cost finding section has used protestant's procedure except that it has rounded off the figure of 0.45 to 0.50.

(15) Empty return ratio:

RESPONDENT

Respondent developed its line-haul expenses using an allowance for empty return of 25 percent for the ratio of empty car-miles to loaded car-miles. This figure was based on judgment and reflects a long range viewpoint. It does not actually represent the empty return ratio experienced at the time the evidence was placed on record. Respondent feels that the figure of 25 percent is a reasonable figure to expect considering the increasing use of TOFC service.

PROTESTANT

Based on information furnished by the participating railroads protestant used ratios of empty to loaded TOFC car-miles of 60 percent for railroad-owned cars in both the East and West, and 23 percent in the East and 100 percent in the West for TTX cars.

COST FINDING SECTION'S COMMENTS

An examination of the working papers shows that in the eastern district the Baltimore & Ohio showed no empty trailer movement on its own cars in either direction during the month of January 1958. During the same month the Pennsylvania showed an empty return of 23 percent for its TTX cars. Based on these showings the cost finding section feels that use of a ratio of empty to loaded car-miles of 25 percent in the eastern district for both railroad-owned and for TTX cars is not unreasonable, and it has used this ratio in its restatement. The working papers also show that in the western district the Texas and New Orleans Railroad showed a ratio of empty to loaded car-miles of 49 percent for the months of October, November, and December, 1957, and January 1958 for railroad-owned cars. Other carriers in the western district showed a ratio of 100-percent empty return for both railroad-owned cars and TTX cars. The cost finding section believes that the high empty return ratios experienced in the western district will not remain static but will be reduced as the TOFC traffic develops. The TOFC service concerned herein is in reality a substitute for boxcar service. It is reasonable to assume, therefore, that the empty return ratio would approach that of boxcars. Statement No. 2–58 shows the ratio of empty to loaded car-miles for carload boxcar traffic to be 36 percent. The use of an empty return ratio of 50 percent for the western district is, therefore, considered to be reasonable and this has been used in our restatement.

(16) Line-haul miles:

RESPONDENT

Respondent based its line-haul miles on the average short-line distance between the origin and the Chicago and East St. Louis gateways, and between the gateways and destination increased by 13 percent to allow for circuity.

PROTESTANT

Protestant computed costs for so-called shortest practicable routes and longest practicable routes.

COST FINDING SECTION'S COMMENTS

If these proceedings did not involve fourth-section considerations, costs computed for respondent's mileages would suffice. Because fourth-section considerations are involved, the costs based on routes longer than the average are important to measure the compensativeness of the proposed rates over the more circuitous routes. Therefore, the cost finding section has used both respondent's average mileages and protestant's longest mileages in its restatement of the costs.

CONCLUSION

Based on the relationship of present sea-land rates to the sea-land costs as restated for the commodities concerned herein, the present sea-land rates equal or exceed the restated out-of-pocket costs for all movements and exceed the fully distributed expense except for eight movements.

The proposed TOFC rates equal or exceed the restated out-of-pocket TOFC costs computed for hauls with average circuity for all movements by TTX car and for all but six movements by railroad-owned cars. The proposed rates equal or exceed the fully distributed costs for 14 movements by railroad-owned cars and for 43 movements by TTX cars, out of the 66 rail movements. The restated sea-land costs, both out-of-pocket and fully distributed, are below the restated TOFC cost for all movements of comparable weight.

For hauls with the greatest amount of circuity the proposed TOFC rates equal or exceed the out-of-pocket costs for 33 of the movements on railroad-owned cars and for 62 of the movements on TTX cars. Based on information in the working papers for these proceedings, it appears that a greater number of trailers is carried on TTX cars than on railroad-owned cars.

APPENDIX D

Statutes Involved

The National Transportation Policy, 49 U.S.C. preceding sections 1, 301, 901, and 1001, provides:

> It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; to cooperate with the several States and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions;—all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. All of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy.

Section 15(7), 49 U.S.C. 15(7), provides:

> Whenever there shall be filed with the Commission any schedule stating a new individual or joint rate, fare, or charge, or any new individual

or joint classification, or any new individual or joint regulation or practice affecting any rate, fare, or charge, the Commission shall have, and it is hereby given, authority, either upon complaint or upon its own initiative without complaint, at once, and if it so orders without answer or other formal pleading by the interested carrier or carriers, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, fare, charge, classification, regulation, or practice; and pending such hearing and the decision thereon the Commission, upon filing with such schedule and delivering to the carrier or carriers affected thereby a statement in writing of its reasons for such suspension, may from time to time suspend the operation of such schedule and defer the use of such rate, fare, charge, classification, regulation, or practice, but not for a longer period than seven months beyond the time when it would otherwise go into effect; and after full hearing, whether completed before or after the rate, fare, charge, classification, regulation, or practice goes into effect, the Commission may make such order with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made within the period of suspension, the proposed change of rate, fare, charge, classification, regulation, or practice shall go into effect at the end of such period; but in case of a proposed increased rate or charge for or in respect to the transportation of property, the Commission may by order require the interested carrier or carriers to keep accurate account in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts are paid, and upon completion of the hearing and decision may by further order require the interested carrier or carriers to refund, with interest, to the persons in whose behalf such amounts were

paid, such portion of such increased rates or charges as by its decision shall be found not justified. At any hearing involving a change in a rate, fare, charge, or classification, or in a rule, regulation, or practice, after the date this amendatory provision takes effect, the burden of proof shall be upon the carrier to show that the proposed changed rate, fare, charge, classification, rule, regulation, or practice is just and reasonable, and the Commission shall give to the hearing and decision of such questions preference over all other questions pending before it and decide the same as speedly as possible.

Section 15a, 49 U.S.C. 15a, provides:

(1) When used in this section the term "rates" means rates, fares, and charges, and all classifications, regulations, and practices relating thereto.

(2) In the exercise of its power to prescribe just and reasonable rates the Commission shall give due consideration, among other factors, to the effect of rates on the movement of traffic by the carrier or carriers for which the rates are prescribed; to the need, in the public interest, of adequate and efficient railway transportation service at the lowest cost consistent with the furnishing of such service; and to the need of revenues sufficient to enable the carriers, under honest, economical, and efficient management to provide such service.

(3) In a proceeding involving competition between carriers of different modes of transportation subject to this Act, the Commission, in determining whether a rate is lower than a reasonable minimum rate, shall consider the facts and circumstances attending the movement of the traffic by the carrier or carriers to which the rate is applicable. Rates of a carrier shall not be held up to a particular level to protect the traffic of any other mode of

transportation, giving due consideration to the objectives of the national transportation policy declared in this Act.

Section 305(c), 49 U.S.C. 905(c), provides:

(c) It shall be unlawful for any common carrier by water to make, give, or cause any undue or unreasonable preference or advantage to any particular person, port, port district, gateway, transit point, locality, region, district, territory, or description of traffic in any respect whatsoever; or to subject any particular person, port, port district, gateway, transit point, locality, region, district, territory, or description of traffic to any unjust discrimination or any undue or unreasonable prejudice or disadvantage in any respect whatsoever: *Provided*, That this subsection shall not be construed to apply to discriminations, prejudice, or disadvantage to the traffic of any other carrier of whatever description. Differences in the classifications, rates, fares, charges, rules, regulations, and practices of a water carrier in respect of water transportation from those in effect by a rail carrier with respect to rail transportation shall not be deemed to constitute unjust discrimination, prejudice, or disadvantage, or an unfair or destructive competitive practice, within the meaning of any provision of this Act.

Section 307(d), 49 U.S.C. 907(d), provides:

(d) all common carriers by water shall, according to their respective powers, afford all reasonable, proper, and equal facilities for the interchange of traffic between their respective lines and connecting lines, and for the receiving, forwarding, and delivering of passengers or property to and from connecting lines; and shall not discriminate in their rates, fares, and charges between connecting lines, or unduly

prejudice any connecting line in the distribution of traffic that is not specifically routed by the shipper. As used in this subsection the term "connecting line" means the connecting line of any common carrier by water or any common carrier subject to part I.

U.S. GOVERNMENT PRINTING OFFICE 1982